SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 185.

A. J. DAGGS AND E. E. DAGGS, APPELLANTS,

vs.

THE PHŒNIX NATIONAL BANK.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED SEPTEMBER 29, 1902.

(16,937.)

(16,997.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 138.

A. J. DAGGS AND R. E. DAGGS, APPELLANTS,

vs.

THE PHŒNIX NATIONAL BANK.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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a In the Supreme Court of the Territory of Arizona.

R. E. DAGGS & A. J. DAGGS, Plaintiffs in Error,
vs.
THE PHŒNIX NATIONAL BANK, a Corporation, Defendants in Error. } No. 622.

Transcript of the Record.

January Term, 1898.

Filed January the 10th, A. D. 1898.

——— ———, *Clerk.*

1 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
R. E. DAGGS and A. J. DAGGS, Defendants. } Complaint.

The plaintiff for cause of action complains and alleges:

That the plaintiff is a corporation organized and existing under the laws of the United States of America; that the defendants are residents of Phœnix, Maricopa county, Arizona Territory.

That on the first day of November, A. D. 1894, A. J. Daggs executed to the plaintiff three certain promissory notes, one of said notes bearing date the first day of November, A. D. 1894, as aforesaid, for the sum of six thousand dollars, payable on or before one year from date of execution, with interest thereon, at the rate of ten per cent. per annum, from date of execution until paid; one of said notes bearing date November 1st, 1894, as aforesaid, for the sum of twelve hundred and forty-one and $\frac{73}{100}$ dollars, payable on or before one year from date of execution, with interest, at the rate of ten per cent. per annum, from date of execution until paid; one of
2 said notes bearing date November 1st, 1894, as aforesaid, for the sum of twenty-five hundred dollars, payable on or before one year from date of execution, with interest, at the rate of ten per cent. per annum, from date of execution until paid.

That in order to secure the payment of said above-described notes the said defendant, R. E. Daggs, afterwards, to wit, on the 28th day of November, A. D. 1894, executed to the plaintiff a mortgage of that date upon certain real property in the county of Maricopa described as follows, to wit: The south half of the southeast one-quarter of section fifteen (15), township one (1) south, range five (5) east, of Gila and Salt River base and meridian; also four water rights in the Consolidated Canal Company, represented by certificates No. 635, 636, 639, 640; also the northeast quarter ($\frac{1}{4}$) and fifty-three and one-third acres of the northwest quarter ($\frac{1}{4}$) of section nineteen

(19), township one (1) south, range five (5) east, of Gila and Salt River base and meridian, the last-mentioned fifty-three acres being further described as follows: Beginning at the northeast corner of said northwest quarter section, running thence 830 feet west along the north line of said section, thence twenty-six hundred and forty feet south to the southern boundary of said quarter section, north to the place of beginning, together with all the water rights and shares appurtenant to said lands, all lying within the said county of Maricopa, Territory of Arizona; also all of the north one-half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) and the south one-half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) and the northwest quarter ($\frac{1}{4}$) of the northwest quarter ($\frac{1}{4}$) of section ten (10), township one (1) north, range five (5) east, of Gila and Salt River base and meridian, with all water rights thereto appertaining.

3

Which said mortgage was duly acknowledged and certified so as to entitled it to be recorded, and the same was afterwards, to wit, on the 28th day of November, 1894, duly recorded in the office of the county recorder of the county of Maricopa, in Book 20 of Mortgages, pages 205, 206, 207, and 208, a copy of which said mortgage, with the endorsements thereon, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

That the plaintiff, The Phœnix National Bank, is now the lawful owner and holder of said promissory notes and mortgage herein described, and that no part of the principal or interest of the said notes or either of them or of the said mortgage has been paid.

That the said notes and mortgage provide for an attorney's fee of two per cent. on the amount found due in any suit to recover on said notes or mortgage.

Wherefore the plaintiff demands judgement against the defendant A. J. Daggs for the sum of nine thousand seven hundred and forty-one and $\frac{73}{100}$ dollars ($9,741.73), with interest thereon, at the rate of ten per cent. per annum, from the first day of November, 1894, and for the further sum of two per cent. upon the amount found due upon said notes as attorney's fees, and for the costs of suit, and that the whole of said judgement be made payable in gold coin of the United States, and that the usual decree may be made for the sale of said premises for gold coin of the United States by the sheriff of the county of Maricopa, according to law and the practice of the court; that the proceeds of said sale in gold coin of the United States may be applied to the payment of the amount due upon said notes and mortgage for principal, interest, costs, and expenses of the sale, and that the defendants and all persons claiming under them subsequent to the execution of said mortgage on said premises, either as purchasers, encumbrancers, or otherwise, may be barred and foreclosed of all right or equity of redemption to said premises and every part thereof, and that said plaintiff may have judgement against said defendant, A. J. Daggs, for any deficiency which may remain after applying all the proceeds of the sale of said premises applicable to the satisfaction of the said judgement, and that the plaintiff or any other parties to this suit may become purchasers at

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such sale; that the sheriff execute a deed to the purchaser at such sale, and that said purchaser be let into the premises on production of the sheriff's deed therefor, and that the plaintiff may have such other and further relief in the premises as to the court may seem meet and equitable.

L. H. CHALMERS,
Attorney for the Plaintiff.

EXHIBIT "A."

Realty Mortgage.

Know all men by these presents: that I, R. E. Daggs, mort-
5 gagor, of Phœnix, county of Maricopa, Territory of Arizona, for and in consideration of one dollar and as security for the three promissory notes of A. J. Daggs hereinafter fully set out, and for other and further valuable consideration to me in hand paid by the Phœnix National Bank of Phœnix, Maricopa county, Arizona, mortgagee have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said Phœnix national bank all that certain premises described as follows, to wit: The south half of the southeast one-quarter of section fifteen, township one, south range five, east of Gila and Salt River base and meridian, also four water rights in the Consolidated Canal Company represented by certificates No. 635, 636, 639, and 640; also the northeast quarter (¼) and fifty-three and one-third acres of the northwest quarter (¼) of section nineteen (19), township one (1), south range five (5) east of Gila and Salt River base and meridian, the last-mentioned fifty-three acres being further described as follows: Beginning at the northeast corner of said northwest quarter section running thence 830 feet west along the north line of said section, thence twenty-six hundred and forty feet south to the southern boundary of said quarter, thence 830 feet east along said southern boundary, thence twenty-six hundred and forty feet along the eastern boundary of said quarter section north to the place of beginning, together with all the water rights and shares appurtenant to said lands all lying within the said county of Maricopa,
Territory of Arizona, also all of the north one-half (½) of the
6 southwest quarter (¼) and the south one-half (½) of the northwest quarter (¼) and the northwest quarter of the northwest quarter (¼) of section ten (10) township one (1) north range five (5) east of Gila and Salt River base and meridian, with all water rights thereto appurtaining.

To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said The Phœnix National Bank and its heirs and assigns forever.

This conveyance is intended as a mortgage to secure the payment of three certain promissory notes, given by A. J. Daggs of date, Nov. 1st, 1894, which said notes are in words and figures following, to wit:

No. —. PHŒNIX, ARIZONA, *Nov.* 1*st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay to the Phœnix national bank or order, the sum of six thousand dollars, in U. S. gold coin with interest thereon in like gold coin, at the rate of ten per cent. per annum from date until paid. Interest payable annually. All payable at Phœnix in Maricopa county, Arizona, and in case suit is brought hereon, I further agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$6,000. A. J. DAGGS.

Due —— —, 189–.

No. —. PHŒNIX, ARIZONA, *Nov.* 1*st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay to the Phœnix national bank or order the sum of twelve hundred and forty-one and $\frac{73}{100}$ dollars, in U. S. gold coin with interest thereon in like gold coin, at the rate of ten per cent. per annum from date until paid. Interest payable annually. All payable at Phœnix, in Maricopa county, Arizona, and in case suit is brought on this note, I agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$1,241.73. A. J. DAGGS.

Due —— —, 189–.

7 No. —. PHŒNIX, ARIZONA, *Nov.* 1*st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay to the Phœnix national bank or order, the sum of twenty-five hundred dollars in U. S. gold coin, with interest thereon in like gold coin, at the rate of ten per cent. per annum from date until paid. Interest payab e annually. All payable at Phœnix, in Maricopa county, Arizona, and in case suit is brought on this note I agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$2,500. A. J. DAGGS.

Due —— —, 189–.

And this instrument shall be void if said promissory notes principal and interest be well and truly paid when due, according to the tenor and effect thereof. But it is distinctly understood and agreed that if the interest on said promissory note-, or the principal thereon, shall not be punctually paid when the same shall become due, as in said promissory — mentioned, then, and in such case, the principal sum of said note- and the interest thereon, shall be deemed and taken to be wholly due and payable, and proceedings may forthwith be had by the said mortgagee the Phœnix national bank, its heirs, executors, administrators and assigns, for the recovery of the same, either by suit on said notes or on this mortgage and notes; and in any suit or other proceedings that may be had for the recovery of the said principal sum and interest thereon, it shall and

may be lawful for the said mortgagee, its heirs, executors, administrators or assigns, to include in the judgement that may be recovered, attorneys' fees not exceeding two per cent. thereon, upon the amount found due the plaintiff on said notes and this mortgage,
8 or in case of settlement after suit brought, but before judgement rendered, then one per cent. on amount found due at the time of settlement as well as all payments that the said mortgagee, its heirs, executors, administrators or assigns may be obliged to make for its security, or on account of any taxes, charges, incumbrances or assessments whatsoever on the said premises, legally laid or made thereon.

Witness my hand, this 28th day of November, A. D. 1894.

R. E. DAGGS. [SEAL.]

Signed, sealed, and delivered in the presence of—

——— ———.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Before me, L. H. Chalmers, a notary public in and for the county of Maricopa, Territory of Arizona, on this day personally appeared R. E. Daggs, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 28th day of November, A. D. 1894.

[NOTARIAL SEAL.] L. H. CHALMERS,
Notary Public.

Endorsements: No. 7796. Realty mortgage, from R. E. Daggs to the Phœnix national bank, dated Nov. 28th, 1894. Filed
9 and recorded at request of L. H. Chalmers Nov. 28, 1894, at 4.25 p. m., Book 20 — Mortgages, pages 205, 206, 207, 208. Neir Osborn, county recorder, by H. C. Meador, deputy recorder.

TERRITORY OF ARIZONA, }
County of Maricopa. }

I, Neir Osborn, county recorder in and for county and Territory aforesaid, do hereby certify that the within instrument was filed for record at 4.25 p. m., on this 28th day of November, 1894, and duly recorded in Book 20 of Mortgages, records of Maricopa county, Arizona, at pages 205, 206, 207, and 208.

Witness my hand and official seal the day and year above written.

NEIR OSBORN,
County Recorder,

[County Recorder's Seal.]

By H. C. MEADOR,
Deputy Recorder.

10 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
R. E. DAGGS and A. J. DAGGS, Defendants.

Action brought in the district court of the third judicial district of the Territory of Arizona in and for Maricopa county, and the complaint filed in said Maricopa county, in the office of the clerk of said district court.

In the name of the Territory of Arizona, to R. E. Daggs and A. J. Daggs, defendants, Greeting:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the district court of the third judicial district of the Territory of Arizona in and for Maricopa county and answer the complaint therein filed with the clerk of this said court at Phœnix, in said county, within ten days after the service upon you of this summons, if served in this said county, or if served out of this said county and within this said judicial district, then within twenty days thereafter, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

11 Given under my hand and seal of the district court of the third judicial district of the Territory of Arizona in and for Maricopa county this 21 day of February, A. D. 1896.

[SEAL.]

J. E. WALKER,
Clerk of said District Court,
By —— ——,
Deputy Clerk.

OFFICE OF THE SHERIFF OF THE COUNTY OF MARICOPA.

I hereby certify that I received the within summons on the 21st day of February, A. D. 1896, at the hour 4.15 p. m., and personally served the same on the 21st day of February, A. D. 1896, on R. E. Daggs and A. J. Daggs, being the defendants named in said summons, by delivering to each of the said defendants, in the city of Phœnix, county of Maricopa, a copy of said summons, to which was attached a true copy of the complaint mentioned in said summons.

Dated this 21st day of February, A. D. 1896.

G. H. ORME, *Sheriff,*
By —— ——,
Deputy Sheriff.

Fees.

Service	
Copies	$3.00
Travel, — miles	1.20
Publication	30
Total	$4.50

12 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, R. E. DAGGS, ET AL., Defendants. } Answer.

Come the defendants and for answer to the plaintiff's complaint:

1.

Accept to the sufficiency of the said complaint because the said complaint does not state facts sufficient to constitute a cause of action.

2.

Should the defendants' demurrer be by the court overruled, the defendants, further answering, deny each and every allegation therein contained except the execution of the instrument sued on.

A. J. DAGGS,
Att'y for Defendant- R. E. Daggs & A. J. Daggs.

13 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

PHŒNIX NATIONAL BANK, a Corporation,
Plaintiff,
vs.
A. J. DAGGS ET AL., Defendants. } 1st Amended Answer.

Comes R. E. Daggs, one of the defendants in the above-entitled cause, and for his separate and amended answers alleges:

I.

That he is a mere surety in the above-entitled action, and mortgaged his real property and pledged his personal property as such surety, and asks that the suretyship be tried in conformity to Rev. Stat. of Arizona, title 1, entitled "Principal and surety."

II.

Defendant admits that the three promissory notes sets forth and sets out that they shall bear interest at the "rate of ten per cent. per annum from date until paid" upon the amount in each of said notes expressed. Defendant says and alleges that the said notes are tainted with usury, for that there is no rate of interest fixed by law in Arizona Territory or by title 38, entitled "Interest of Revised Statutes," thereof governing notes and bills and other evi-
14 dences of debt, except after maturity, and that the interest so set out and charged in the first instance in said notes exceeds the rate of seven dollars per hundred dollars per year, and exceeds the rate of seven per cent. per annum, contrary to the form of the statute in such cases made and provided and contrary to

the United States banking act and to sections 5197 and 5198 thereof, and the said interest was charged and contracted for on the part of the plaintiff with full knowledge of said sections of said United States banking act and knowingly in violation of such act and in defiance of sections 5197 and 5198 thereof.

Wherein and wherefore, and by force of said United States banking act and of sections 5197 and 5198 of said statute, the plaintiff forfeited its right to receive, collect, or recover in any manner of or from this defendant the interest on said three promissory notes or the value of the interest thereon.

III.

This defendant, further answering, says that the plaintiff holds as a pledge certificate of one whole share of water stock in the Tempe Irrigating Canal Company, and certificate of one whole share and one-half share of water stock in the Western branch of the Tempe Irrigating Canal Company, and certificate of one and one-half shares of water stock in the Southern branch of the Tempe Irrigating Canal Company, of the reasonable value of four thousand dollars ($4,000.00); that the said shares were pledged by the defendant A. J. Daggs as collateral security to his said three promissory notes, as set forth in plaintiff's complaint, and to secure
15 the payment thereof; that the said plaintiff has converted the said water stocks so held as a pledge, as aforesaid, to its own use and benefit, and have wholly failed to give credit on said notes for the value of the same or any part thereof and refused to account for value of same.

IV.

This defendant, for another and further answer to plaintiff's complaint, alleges—

That at the time of the execution of his said mortgage as surety for the said three promissory notes sued on by plaintiff it was specifically agreed and understood that a certain promissory note described as follows, to wit, and marked "Exhibit A" and made a part hereof:

No. 1340. Due Sept. 1.

$5,000.00. PHŒNIX, ARIZONA, *July* 1, 1893.

On the 1st day of September, 1893, without grace, we or either of us, for value received, promise to pay Thos. Armstrong, Jr., at the Phœnix national bank, at their office in Phœnix, Arizona, five thousand dollars ($5,000) in United States gold coin, with interest, at the rate of 1 and ¼ per cent. per month, until paid. In case of legal proceedings herein, we or either of us agree to pay 10 per cent. of amount due hereon as attorneys' fees.

W. A. AND P. P. DAGGS.

Secured by chattel mortgage of even date herewith.

W. A. DAGGS.
P. P. DAGGS.

And endorsed on the back as follows: Thos. Armstrong, Jr., Sept. 30, 1893, interest from July 1st to Oct. 1st, 1893, $187.50; Dec. 30, 1893, interest from Oct. 1st, '93, to Jan. 1st, '94, $187.50; Apr. 2nd, 1894, interest from Jan'y 1st to April 1st, $187.50.

16 *Which* was a part of the consideration for which said promissory notes sued on by plaintiff were given; that said note and mortgage securing the same were then in litigation, and it was specifically agreed and understood that the said litigation should be carried on by the assistance and in the name of plaintiff until the same should be merged in judgement and finally collected and the proceeds applied in satisfaction of the said three promissory notes aforesaid.

V.

Defendant further says he executed the said mortgage as security upon the faith of the aforesaid understanding and agreement. Defendant further says that the plaintiff has wholly failed and refused to permit the said action to be prosecuted to final judgement in its name, and has failed and refused to execute the appeal bond required by law or permit said action to be carried on in its name in any manner.

VI.

Defendant for a further answer and defense to plaintiff's complaint alleges—

That the said three promissory notes sued on were executed in payment for a certain promissory note executed by W. A. and P. P. Daggs, as copartners, and by W. A. and P. P. Daggs, as individuals, to Thos. Armstrong, Jr., and duly assigned and delivered by said Thos. Armstrong, Jr., to the plaintiff, and was then assigned and delivered by the plaintiff to defendants, codefendant A. J. Daggs, upon the execution of the three promissory notes sued on by the plaintiff.

17 Defendant further says that at the time of the execution of the mortgage by defendant as surety to the three promissory notes sued on by the plaintiff it was expressly agreed and understood that the plaintiff was liable as assignor upon the aforesaid five-thousand-dollar ($5,000.00) note as assignors, and in case of the failure to collect the same of and from the makers thereof upon any judgement obtained thereon in favor of plaintiff that the said five-thousand-dollar note and interest should be deducted or applied as a payment upon the three promissory notes, and in no event should this defendant be liable for more than the difference between the amount of the said five-thousand-dollar note and interest and the three promissory notes sued on.

Defendant further says that the makers of the said five-thousand-dollar note as security by defendant were and ever since have been and are now actually and notoriously insolvent and have no property out of which an execution could be satisfied; all of which is and was well known to plaintiff.

Wherefore this defendant prays that he be held and bound only as a surety in this action.

II.

That plaintiff recover nothing by its action as interest on said three promissory notes.

III.

That plaintiff be required to apply the sum of four thousand dollars, the value of said water stock converted to its own use, in liquidation of said debt.

18

IV.

That plaintiff be required to apply the amount found due on the said five-thousand dollar note executed by W. A. and P. P. Daggs aforesaid to the liquidation of said indebtedness of the three promissory notes.

V.

That plaintiff take nothing by his action against this defendant by reason of his breach of the contract to prosecute the suit to recover the said five-thousand-dollar note, and for his costs and for general relief.

R. E. DAGGS, *Pro Se.*

R. E. Daggs, being first duly sworn, says that he, too, read the foregoing answer and knows the contents thereof, and the same are true.

R. E. DAGGS.

Subscribed and sworn to before me this 12th day of October, 1896.

J. E. WALKER, *Clerk.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, *vs.* A. J. DAGGS ET AL., Defendant-. } Answer to Counter-claim.

Now comes the plaintiff and demurs to the counter-claim
19 on file herein, and for cause of demur- alleges that the counter-claim does not set up facts sufficient to constitute a cause of action.

Should said demurrer be overruled, the plaintiff denies each and every allegation in said counter-claim set forth.

And of this puts itself upon the county.

Wherefore plaintiff prays that said counter-claim be dismissed

and that judgement be rendered in accordance with the prayer in the complaint and for costs.

L. H. CHALMERS,
Att'y for Plaintiff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
R. E. DAGGS and A. J. DAGGS, Defendants.
} Supplemental Complaint.

Now comes the plaintiff, by leave of the court first had and obtained, and files this his supplemental complaint in the above-entitled cause, and for cause of the said supplemental complaint alleges:

That since the beginning of this action, to wit, on July 2nd, 1896, this plaintiff, in order to protect his mortgage lien upon the property described in the complaint herein, was compelled to purchase tax sale certificate No. 100 July 6th, 1895, for territorial and county taxes for the year 1894; which certificate was a lien on the south forty (40) acres of the west one hundred (100) acres of the northwest one-quarter (¼) of section nineteen (19), township one (1) south of range five (5) east, of the Gila and Salt River base and meridian. Said plaintiff was compelled to pay therefore the sum of twenty-two dollars and sixty cents ($22.60). On July 8th, 1896, the said plaintiff was compelled to take up tax-sale certificate No. 97, dated July 6th, 1895, for territorial and county taxes for the year 1894, on the south twenty (20) acres of fraction of east one-half (½) of the northwest one-quarter (¼) of section nineteen (19), township one (1) south, range five (5) east, of the Gila and Salt River base and meridian, paying therefore the sum of $13.03; that the said tax certificate was a lien upon the land herein mentioned, which land is covered by the mortgage lien in this action.

That defendants have not paid said money to plaintiffs or any portion thereof.

Wherefore plaintiff prays that the amount of money, $35.65, which it has expended to protect its mortgage lien be included in any judgement or decree of foreclosure that it may obtain in the above-entitled cause.

L. H. CHALMERS &
EUGENE S. IVES,
Attorneys for Plaintiff.

21 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS ET AL., Defendants. } Answer to Supplemental Complaint.

Comes the defendant A. J. Daggs and moves the court to strike out the alleged supplemental complaint here for the following reasons:

I.

Because no notice was given defendants of the application to file the said supplemental complaint.

II.

Because no notice of any motion was had upon the defendants for the application to file said complaint.

A. J. DAGGS.

Should the defendant's motion be by the court overruled, defendant, answering said supplemental complaint and for answer first, demurs for the following reasons:

I.

Because the supplemental complaint does not state facts sufficient to constitute a cause of action for taxes paid.

22

II.

Because the supplemental complaint does not warrant the relief prayed.

Should the demurrer be by the court overruled, the defendant for answer denies each and every allegation in said supplemental complaint contained.

A. J. DAGGS.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, BENJAMIN GOLDMAN, JAMES C. GOODWIN, and R. E. Daggs, Defendants. } Complaint.

The plaintiff for cause of action complains and alleges:

That the plaintiff is a corporation organized and existing under the laws of the United States of America; that the defendants A. J. Daggs and R. E. Daggs are residents of Phœnix, Maricopa county, Arizona Territory, and the defendants Benjamin Goldman and James C. Goodwin are residents of Tempe, Maricopa county, Arizona Territory.

That on the first day of November, A. D. 1894, the defend-
23 ant A. J. Daggs executed to the plaintiff three certain promissory notes, one of said notes bearing date the first day of November, A. D. 1894, as aforesaid, for the sum of six thousand dollars, payable on or before one year from date of execution, with interest thereon, at the rate of ten per cent. per annum, from date of execution until paid; one of said notes bearing date November 1st, 1894, as aforesaid, for the sum of twelve hundred and forty-one and $\frac{73}{100}$ dollars, payable on or before one year from date of execution, with interest, at the rate of ten per cent. per annum, from date of execution until paid; one of said notes bearing date November 1st, 1894, as aforesaid, for the sum of twenty-five hundred dollars, payable on or before one year from date of execution, with interest, at the rate of ten per cent. per annum, from date of execution until paid.

That, in order to secure the payment of said above-described notes, the said A. J. Daggs afterwards, to wit, on the 28th day of November, A. D. 1894, executed to the plaintiff a mortgage upon certain real property in the county of Maricopa, described as follows, to wit: The southwest quarter ($\frac{1}{4}$) of section twenty-two (22), township one (1) south of range four (4) east, Gila and Salt River base and meridian, containing, according to survey, one hundred and sixty acres, being, lying, and situate in Maricopa county, Arizona Territory; also the northwest quarter ($\frac{1}{4}$) of section thirty-five (35), township one (1) south of range four (4) east, Gila and Salt River base and meridian, being, lying, and situate in the county of Maricopa, Territory of Arizona, and containing, according
24 to survey, one hundred and sixty acres; also the northwest quarter of section nineteen (19), in township one (1) south of range five (5) east, Gila and Salt River base and meridian, except, however, the following-described portion: Beginning at the northeast corner of said quarter section, thence running west 830 feet along the north line of said one-fourth section, thence south 2,640 feet to the south line of said quarter section, thence east 830 feet along the south line of said one-fourth ($\frac{1}{4}$) section to the center of said section 19, thence north along the east line of said quarter section 2,640 feet to place of beginning, and being a strip off the east side of said ($\frac{1}{4}$) section, containing 51.53 acres of land, being, lying, and situate in Maricopa county, Arizona Territory, together with all water rights and shares belonging to said land.

Which said mortgage was duly acknowledged and certified, so as to entitle it to be recorded, and the same was afterwards, to wit, on the 28th day of November, 1894, duly recorded in the office of the county recorder of the county of Maricopa, in Book 20 of Mortgages, pages 208, 209, 210, & 211, a copy of which said mortgage, with the endorsements thereon, is hereto annexed, marked "Exhibit A," and made a part of this complaint.

That the plaintiff, The Phœnix National Bank, is now the lawful owner and holder of said promissory notes and mortgage herein described, and that no part of the principal or interest of the said notes or either of them or of the said mortgage has been paid.

That the defendants R. E. Daggs, Benjamin Goldman, and
25 James C. Goodwin have or claim to have some interest or lien upon a portion of the said real property above described, but that the same, whatever it may be, is subject to the lien of the said mortgage.

That the said notes and mortgage provide for an attorney fee of two per cent. on the amount found due in any suit to recover on said notes or mortgage.

Wherefore the plaintiff demands judgement against the defendant A. J. Daggs for the sum of nine thousand seven hundred and forty-one and $\frac{73}{100}$ dollars ($9,741.73), with interest thereon, at the rate of ten per cent. per annum, from the first day of November, 1894, and for the further sum of two per cent. upon the amount found due upon said notes as attorneys' fees and for the costs of suit, and that the whole of said judgement be made payable in gold coin of the United States, and that the usual decree may be made for the sale of said premises for gold coin of the United States by the sheriff of the county of Maricopa, according to law and the practice of the court, that the proceeds of said sale in gold coin of the United States may be applied to the payment of the amount due upon said notes and mortgage for principal, interest, costs, and expenses of the sale; and that the defendants A. J. Daggs, R. E. Daggs, Benjamin Goldman, and James C. Goodwin and all persons claiming under them subsequent to the execution of said mortgage on said premises, either as purchasers, encumbrancers, or otherwise, may be barred and foreclosed of all right or equity of redemption to said premises and every part thereof, and that said plain-
26 tiff may have judgement against the said defendant, A. J. Daggs, for any deficiency which may remain after applying all the proceeds of the sale of said premises applicable to the satisfaction of the said judgement, and that the plaintiff or any other parties to this suit may become purchasers at such sale; that the sheriff execute a deed to the purchaser at such sale, and that said purchaser be let into the premises on production of the sheriff's deed therefor, and that the plaintiff may have such other and further relief in the premises as to the court may seem meet and equitable.

L. H. CHALMERS,
Attorney for the Plaintiff.

EXHIBIT "A."

Realty Mortgage.

Know all men by these presents, that I, A. J. Daggs mortgagor of Phœnix, county of Maricopa, Territory of Arizona for and in consideration of nine thousand seven hundred and forty-one and $\frac{73}{100}$ dollars ($9,741.73) to me in hand paid by the Phœnix National Bank of Phœnix, Maricopa county, Arizona, mortgagee, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said The Phœnix National Bank all that certain premises described as follows, to wit:

The southwest quarter ($\frac{1}{4}$) of section twenty-two (22) township

one (1) south of range four (4) east Gila and Salt River base
26½ and meridian, containing according to survey one hundred and sixty acres, being, lying and situate in Maricopa county, Arizona Territory; also the northwest quarter (¼) of section thirty-five (35) township one (1) south of range four (4) east Gila and Salt River base and meridian being, lying and situate in the county of Maricopa, Territory of Arizona, and containing according to survey one hundred and sixty acres; also the northwest quarter (¼) of section nineteen (19) in township one (1), south of range five (5) east Gila and Salt River base and meridian, except, however, the following-described portion: Beginning at the northeast corner of said quarter section, thence running west 830 feet along the north line of said one-fourth (¼) section, thence south 2,640 feet to the south line of said quarter (¼) section, thence east 830 feet along the south line of said one-fourth (¼) section to the center of said section nineteen (19), thence north along the east line of said ¼ section 2,640 feet to place of beginning, and being a strip off the east side of said (¼) section containing 51.53 acres of land, being, lying and situate in Maricopa county, Arizona Territory.

To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said The Phœnix National Bank, its heirs and assigns forever.

This conveyance is intended as a mortgage to secure the payment of three certain promissory notes, given by A. J. Daggs of date November 1st, 1894, which said notes are in words and figures following, to wit:

27 No. —. PHŒNIX, ARIZONA, *Nov.* 1*st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay to the Phœnix national bank or order, the sum of six thousand dollars in U. S. gold coin with interest thereon in like gold coin at the rate of ten per cent. per annum from date until paid. Interest payable annually. All payable at Phœnix, in Maricopa county, Arizona. And in case suit is brought hereon, I further agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$6,000.

A. J. DAGGS.

Due —— —, 189–.

No. —. PHŒNIX, ARIZONA, *Nov.* 1*st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay to the Phœnix national bank or order, the sum of twelve hundred and forty-one and $\frac{73}{100}$ dollars in the U. S. gold coin, with interest thereon in like gold coin, at the rate of ten per cent. per annum from date until paid. Interest payable annually. All payable at Phœnix, in Maricopa county, Arizona. And in case suit is brought hereon I agree to pay two per cent. of amount found due hereon as attorneys' fees.

$1,241.73.

A. J. DAGGS.

Due —— —, 189–.

No. —. PHOENIX, ARIZONA, *Nov. 1st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay to the Phœnix national bank, or order, the sum of twenty-five hundred dollars in U. S. gold coin, with interest thereon in like gold coin, at the rate of ten per cent. per annum from date until paid. Interest payable annually. All payable at Phœnix, in Maricopa county, Arizona. And in case suit is brought on this note I agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$2,500.00. A. J. DAGGS.

Due —— —, 189–.

28 And this instrument shall be void if said promissory notes, principal and interest be well and truly paid when due according to the tenor and effect thereof. But it is distinctly understood and agreed that if the interest on said promissory notes, or the principal thereon, shall not be punctually paid when the same shall become due, as in said promissory notes mentioned, then, and in such case, the principal sum of said notes, and the interest thereon, shall be deemed and taken to be wholly due and payable, and proceedings may forthwith be had by the said mortgagee, the Phœnix national bank, its heirs executors, administrators, and assigns for the recovery of the same, either by suit on said notes or on this mortgage and notes, and in any suit or other proceedings that may be had for the recovery of the said principal sum and interest thereon, it shall and may be lawful for the said mortgagee, its heirs, executors, administrators or assigns, to include in the judgement that may be recovered, attorneys' fees not exceeding two per cent. thereon, upon the amount found due the plaintiff on said note and this mortgage, or in case of settlement after suit brought, but before judgement rendered, then 1 per cent. on amount found due at the time of settlement, as well as all payments that the said mortgagee, its heirs, executors, administrators or assigns may be obliged to make for its security, or on account of any taxes, charges, incumbrances or assessments whatsoever on the said premises, legally laid or made thereon.

29 Witness my hand this 28th day of November, A. D. 1894.

A. J. DAGGS. [SEAL.]

Signed, sealed, and delivered in presence of—

—— ——.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Before me, L. H. Chalmers, a notary public in and for the county of Maricopa, Territory of Arizona, on this day personally appeared A. J. Daggs, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 28th day of November, A. D. 1894.

L. H. CHALMERS,
Notary Public.

[NOTARIAL SEAL.]

Endorsements: No. 7799. Realty mortgage from A. J. Daggs to the Phœnix national bank, dated Nov. 28, 1894. Filed and recorded at request of L. H. Chalmers Nov. 28, 1894, at 4.55 p. m., Book 20 of Mortgages, pages 208, 209, 210, & 211. Neir Osborn, county recorder, by H. C. Meador, deputy recorder.

30 TERRITORY OF ARIZONA, }
County of Maricopa. }

I, Neir Osborn, county recorder in and for county and Territory aforesaid, do hereby certify that the within instrument was filed for record at 4.55 o'clock p. m. on this 28th day of November, 1894, and duly recorded in Book No. 20 of Mortgages, records of Maricopa county, Arizona, at pages 208, 209, 210, & 211.

Witness my hand and official seal the day and year above written.

NEIR OSBORN,
County Recorder,

[County Recorder's Seal.]

By H. C. MEADOR,
Deputy Recorder.

L. H. Orme, sheriff.

Office of sheriff of Maricopa county.

PHŒNIX, ARIZONA, *February* 25, 1896.

I hereby certify that I received the within summons on the 25th day of February, 1896, at the hour of 10.30 a. m., and personally served the same on the 26th day of February, 1896, on James C. Goodwin and Benjamin Goldman, they being two of the said defendants named in said summons, by delivering to each one of them, the said defendants, Goodwin and Goldman, at the
31 town of Tempe, county of Maricopa, Arizona, a copy of said summons, to which was attached a true copy of the complaint mentioned in said summons.

Dated this 26th day of Feb'y, 1896.

L. H. ORME, *Sheriff,*
By J. T. GIBSON, *Deputy.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, BENJAMIN GOLDMAN, JAMES C. GOODWIN, & R. E. Daggs, Defendants.

Action brought in the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa, and the complaint filed in said Maricopa county, in the office of the clerk of said district court.

In the name of the Territory of Arizona to A. J. Daggs, Benjamin Goldman, James C. Goodwin, and R. E. Daggs, defendants, Greeting:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the district court of the third judicial district of the Territory of Arizona in and for Maricopa county, and answer the complaint therein filed with the clerk of this said court, at Phœnix, in said county, within ten days after the service upon you of this summons, if served in
32 this said county, or if served out of this said county and within this said judicial district, then within thirty days thereafter, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgement by default will be taken against you.

Given under my hand and seal of the district court of the third judicial district of the Territory of Arizona in and for Maricopa county, this 25th day of Feb'y, A. D. 1896.

J. E. WALKER,
Clerk of said District Court,
[SEAL.] By C. H. KNAPP,
Deputy Clerk.

OFFICE OF THE SHERIFF OF THE COUNTY OF MARICOPA.

I hereby certify that I received the within summons on the 25th day of February, A. D. 1896, at the hour — 10.30 a. m., and personally served the same on the 25th day of February, A. D. 1896, on A. J. Daggs and R. E. Daggs, they being two of the said defendants named in said summons, by delivering to each one of them, the above-named defendants, in the city of Phœnix, county of Maricopa, Arizona, a copy of said summons, to which was attached a true copy of the complaint mentioned in said summons.

Dated this 25th day of February, A. D. 1896.

33 *Fees.*

Service	$6.00
Copies	2.40
Travel, 10 miles	3.00
Publication	
Total	$11.40

L. H. ORME, *Sheriff*,
By —— ——,
Deputy Sheriff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, BENJAMIN GOLDMAN, JAMES C. Goodwin, & R. E. Daggs, Defendants.

Supplemental Complaint.

Now comes the plaintiff, by leave of the court first had and obtained, and files this his supplemental complaint in the above-entitled cause, and for cause of the said supplemental complaint alleges:

That since the beginning of this action, to wit, on July 2nd, 1896, this plaintiff has been compelled to take up tax-sale certificate No. 98, dated July 6th, 1895, for territorial and county taxes for the year 1894, upon the northwest one-quarter (¼) of the northwest one-quarter (¼) of section thirty-five (35), township one (1)
34 south, range four (4) east, of the Gila and Salt River base and meridian, paying therefor the sum of thirty-five dollars and forty-two cents ($35.42).

That the said tax certificate was a lien upon the land covered by the mortgage set forth in the complaint in this action, and that on date of July 8th, 1896, this plaintiff was compelled to take up tax certificate No. 128, of date July 6th, 1895, for territorial and county taxes for year 1895, and the south one-half (½) of the south-east one-quarter (¼) of the southwest one-quarter (¼) of section twenty-two 22 of township one (1) south, range four (4) east, of the Gila and Salt River base and meridian, paying therefor the sum of $52.48.

That said taxes were a lien upon the land set out in the complaint in this mortgage.

Wherefore plaintiff prays that the amount of money, eighty-seven dollars and ninety cents ($87.90), which it has expended to protect its mortgage lien, be included in any judgement or decree of foreclosure that it may obtain in the above-entitled cause.

L. H. CHALMERS &
EUGENE S. IVES,
Attorneys for Plaintiff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, *vs.* A. J. DAGGS ET AL., Defendants. } No. 2555. Answer.

Now comes the plaintiff and, for answer to the counter-claim set out in the amended answer on file herein, demurs to the said counter-claim on the grounds that it does not state facts sufficient to constitute a cause of action.

Should said demurrer be overruled, plaintiff, further answering, denies each and every allegation in said counter-claim contained, and of this puts itself upon the country.

Wherefore plaintiff prays that the defendant take nothing by reason of their counter-claim, and that plaintiff recover upon its complaint herein.

L. H. CHALMERS,
Att'y for Plaintiff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, *vs.* R. E. DAGGS ET AL., Defendants. } 1st Amended Answer.

Comes R. E. Daggs, one of the defendants in the above-entitled cause, and for his separate and amended answers alleges:

I.

That he is a mere surety in the above-entitled action and mortgaged his real property and pledged his personal property as such surety, and asks that the suretyship be tried in conformity to Rev. Stat. of Arizona, title L, entitled "Principal and surety."

II.

Defendant admits that the three promissory notes sets forth and sets out that they shall bear interest at the "rate of ten per cent. per annum from date until paid" upon the amount in each of said notes expressed. Defendant says and alleges that the said notes are tainted with usury, for that there is no rate of interest fixed by law in Arizona Territory or by title 38, entitled "Interest of Revised Statutes," thereof governing notes and bills and other evidences
37 of debt except after maturity, and that the interest so set out and charged in the first instance in said notes exceeds the rate of seven dollars per hundred dollars per year and exceeds the rate of seven per cent. per annum, contrary to the form of the statute in such cases made and provided and contrary to the United States banking act and to section 5197 and 5198 thereof, and the

said interest was charged and contracted for on the part of the plaintiff with the full knowledge of said sections of said United States banking act and knowingly in violation of such act and in defiance of sections 5197 and 5198 thereof.

Wherein and wherefore, and by force of said United States banking act and of sections 5197 and 5198 of said statute, the plaintiff forfeited its right to receive, collect, or recover in any manner of or from this defendant the interest on said three promissory notes or the value of the interest thereon.

III.

This defendant, further answering, says that the plaintiff holds as a pledge certificate of one whole share of water stock in the Tempe Irrigating Canal Company, and certificate of one whole share and one half share of water stock in the Western branch of the Tempe Irrigating Canal Company, and certificate of one and one-half shares of water stock in the Southern branch of the Tempe Irrigating Canal Company, of the reasonable value of four thousand dollars ($4,000.00); that the said shares were pledged by defendant A. J. Daggs as collateral security to his said three promissory notes, as set forth
38 in plaintiff's complaint, and to secure the payment thereof; that the said plaintiff has converted the said water stocks so held as a pledge, as aforesaid, to its own use and benefit, and have wholly failed to give credit on said notes for the value of the same or any part thereof and refused to account for value of same.

IV.

This defendant, for another and further answer to plaintiff's complaint, alleges:

That at the time of the execution of his said mortgage as surety for the said three promissory notes sued on by plaintiff it was specifically agreed and understood that a certain promissory note described as follows, to wit, and marked "Exhibit A" and made a part hereof:

No. 1340. Due Sept. 1.

$5,000.00. PHŒNIX, ARIZONA, *July* 1, 1893.

On the 1st day of September, 1893, without grace, we or either of us, for value received, promise to pay Thos. Armstrong, Jr., at the Phœnix national bank, at their office in Phœnix, Arizona, five thousand dollars ($5,000) in United States gold coin, with interest at the rate of 1 and ½ per cent. per month until paid. In case of legal proceedings herein, we or either of us agree to pay 10 per cent. of amount due hereon as attorney's fees.

W. A. AND P. P. DAGGS.

Secured by chattel mortgage of even date herewith.

W. A. DAGGS.
P. P. DAGGS.

And endorsed on the back as follows: Thos. Armstrong, Jr. Sept. 30th, 1893, interest from July 1st to Oct. 1st, 1893, $187.50. Dec. 30th, 1893, interest from Oct. 1st, '93, to Jan'y 1st, '94, $187.50. Apr. 2nd, 1894, interest from Jan'y 1st to April 1st, $187.50.

39 Which was a part of the consideration for which said promissory notes sued on by plaintiff were given; that said note and mortgage securing the same were then in litigation, and it was specifically agreed and understood that the said litigation should be carried on by the assistance and in the name of plaintiff until the same should be merged in judgement and finally collected and the proceeds applied in satisfaction of the said three promissory notes aforesaid.

V.

Defendant further says that he executed the said mortgage as security upon the faith of the aforesaid understanding and agreement. Defendant further says that the plaintiff has wholly failed and refused to permit the said action to be prosecuted to final judgement in its name, and has failed and refused to execute the appeal bond required by law or permit said action to be carried on in its name in any manner.

VI.

Defendant for a further answer and defense to plaintiff's complaint alleges that the said three promissory notes sued on were executed in payment for a certain promissory note executed by W. A. and P. P. Daggs as copartners and by W. A. and P. P. Daggs as individuals to Thos. Armstrong, Jr., and duly assigned and delivered by said Thos. Armstrong, Jr., to the plaintiff, and was then assigned and delivered by the plaintiff to defendants, codefendant A. J. Daggs, upon the execution of the three promissory notes sued on by the plaintiff. Defendant further says that at the

40 time of the execution of the mortgage by defendant as surety to the three promissory notes sued on by the plaintiff it was expressly agreed and understood that the plaintiff was liable as assignor upon the aforesaid five-thousand-dollar ($5,000.00) note as assignors, and in case of the failure to collect the same of and from the makers thereof upon any judgement obtained thereon in favor of plaintiff that the said five-thousand-dollar ($5,000) note and interest should be deducted or applied as a payment upon the three promissory notes, and in no event should this defendant be liable for more than the difference between the amount of the said five-thousand-dollar note and interest and the three promissory notes sued on.

Defendant further says that the makers of the said five-thousand-dollar note, at the date of the execution of the said mortgage as security by defendant, were and ever since have been and are now actually and notoriously insolvent, and have no property out of which an execution could be satisfied, all of which is and was well known to the plaintiff.

Wherefore this defendant prays that he be held and bound only as a surety in this action.

II.

That plaintiff recover nothing by its action as interest on said three promissory notes.

III.

That plaintiff be required to apply the sum of four thousand dollars, the value of said water stock converted to its own use, in liquidation of said debt.

IV.

41 That plaintiff be required to apply the amount found due on the said five-thousand-dollar note, executed by W. A. and P. P. Daggs aforesaid, to the liquidation of said indebtedness of the three promissory notes.

V.

That plaintiff take nothing by *his* action against this defendant by reason of his breach of the contract to prosecute the suit to recover the said five-thousand-dollar note, and for his costs and for general relief.

R. E. DAGGS, *Pro Se.*

R. E. Daggs, being first duly sworn, says that he has read the foregoing answer and knows the contents thereof, and the same are true.

R. E. DAGGS.

Subscribed and sworn to before me this 12th day of October, 1896.

J. E. WALKER, *Clerk.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, *vs.* A. J. DAGGS ET AL., Defendants. } Amended Answer.

Should defendants' pleas in abatement and demurrers
42 be by the court overruled, the defendant A. J. Daggs, answering separately by his amended answer, denies each and every allegation in said complaint contained not hereinafter admitted or otherwise pleaded.

I.

This defendant admits the residence of A. J. Daggs.

II.

This defendant admits the execution of the three promissory notes, as alleged, and the execution of the mortgages to secure the same by defendant A. J. Daggs, as alleged.

III.

This defendant admits that the three promissory notes sets forth and sets out that they shall bear interest at the "rate of ten per cent. per annum from date until paid" upon the amounts in each of said notes expressed.

IV.

This defendant for his first defense and his defense to the interest on said notes alleges that the said notes are tainted with usury, for that there is no rate of interest fixed by law in Arizona Territory or by title XXXVIII, entitled "Interest of Revised Statute," thereof, governing notes and bills or other evidences of debts, except after maturity, and that the interest so set out and charged in the first instance in said notes exceeds the rate of seven dollars per hundred dollars per year and exceeds the rate of seven per cent. per annum, contrary to the form of the statute in such cases made and provided and contrary to the United States banking act and to sections
43 5197 and 5198 thereof, and the said interest was charged and contracted for on part of the plaintiffs with full knowledge of said sections of said United States banking act, and knowingly in violation of said act, and in defiance of sections 5197 and 5198 thereof. Wherein and whereby and by force of said United States banking act and of sections 5197 and 5198 of said statute the plaintiff forfeited its rights to receive, collect, or recover in any manner of or from this defendant the interest on said three promissory notes or the value of the interest thereon.

Wherefore the defendant asks to be relieved and discharged from the payment of any interest on said notes or either of them, and prays judgement accordingly.

V.

This defendant, for another answer and counter-claim to plaintiff's complaint, alleges:

First. That the plaintiff is indebted to this defendant upon a certain promissory note executed by W. A. and P. P. Daggs, as co-partners, and by W. A. and P. P. Daggs, as individuals, and delivered to Thos. Armstrong, Jr., and assigned by said Thos. Armstrong, Jr., in blank to the plaintiff, and said note was on the twenty-eighth day of November, A. D. 1894, for a valuable consideration in writing, assigned by the plaintiff to this defendant, and at the date of said assignment the makers of said note were, ever since have been, and are now notoriously insolvent; all of which plaintiff well knew; which note is in words and figures as follows, to wit, marked "Exhibit A," and made a part hereof:

No. 1340. Due Sept. 1st.

44 $5,000.00. PHŒNIX, ARIZONA, *July 1st*, 1893.

On the 1st day of September, 1893, without grace, we or either of us, for value received, promise to pay to Thos. Armstrong, Jr., at the Phœnix national bank, at their office in Phœnix, Arizona, five

thousand dollars ($5,000.00) in United States gold coin, with interest, at the rate of 1 and ¼ per cent. per month, until paid. In case of legal proceedings hereon we or either of us agree to pay ten per cent. of amount due hereon as attorneys' fees.

W. A. AND P. P. DAGGS.

Secured by chattel mortgage of even date herewith.

W. A. DAGGS.
P. P. DAGGS.

And endorsed on the back as follows: "Thos. Armstrong, Jr. Sept. 30th, 1893, interest from July 1st to Oct. 1st, 1893, $187.50. Dec. 30th, 1893, interest from Oct. 1st, '93, to Jan'y 1st, 1894, $187.50. April 2nd, 1894, interest from Jan'y 1st to April 1st, $187.50."

Second. And no part of said note has been paid since the said assignment by the plaintiff to this defendant, and there is now due thereon the sum of seven thousand and seventy-six and $\frac{91}{100}$ dollars ($7,076.91).

Wherefore the defendant prays judgement against the plaintiff for the sum of seven thousand and seventy-six dollars and $\frac{91}{100}$ ($7,076.91) and costs of suit, the value of said note and interest thereon according to the tenor and effect of said note.

VI.

This defendant, for another and further defense to plaintiff's complaint, answers and alleges that at the time of the execution of the three promissory notes mentioned in plaintiff's complaint the plaintiff and this defendant entered into a contract in writing, a copy of which is hereto attached and made a part hereof and marked "Exhibit B," wherein the plaintiff, as a part of the consideration of the three said promissory notes, sold and assigned and expressly stipulated that the three said promissory notes should be received in payment for all its right, title, and interest in and to that certain right in action wherein Hugh McCrum was plaintiff and W. A. and P. P. Daggs *was* defendant and plaintiff was intervenor, over that certain five-thousand-dollar note marked "Exhibit A" herein, and mortgage securing the same.

That at the time of the said purchase and assignment of the said right in action involving the said five-thousand-dollar note and mortgage, as aforesaid, the makers of said note were and ever since have been and are now actually and notoriously insolvent, all of which the plaintiff well knew, and it was further agreed between the plaintiff and this defendant that the said litigation and suit aforesaid should be carried on in the name of plaintiff until the said cause of action should be determined and settled, and that plaintiff should pay all costs of said litigation accruing prior to Nov. 1st, 1894, and this defendant should bear all costs accruing thereafter. Defendant says that he has paid out and expended large sums of money in the prosecution of said suit, to wit, forty-

five dollars and $\frac{65}{100}$ ($45.65) as transcript fee from court below, and the sum of five hundred dollars ($500) as costs, and expended work and labor of the reasonable value *and* more than five hundred dollars ($500.00), and duly performed all the conditions of said contract on his part, but that the plaintiff has failed and refused
46 to perform the conditions of its said contract in this, that it has failed to pay the expenses that accrued prior to Nov. 1st, 1894, to wit, the transcript fee aforesaid, and has wholly failed and refused to allow its name to be used in the continuation of the said suit and wholly failed and refused to sign the bond in appeal to court of last resort as principal, all to defendant's damage in the sum of ten thousand one hundred and twenty-two and $\frac{55}{100}$ dollars ($10,122.55).

VII.

This defendant, for another and further defense to plaintiff's complaint, answers and alleges:

That he pledged personal property as security to the said promissory notes with the plaintiff as follows: Certificate *to* one whole share of water stock in the Tempe Irrigating Canal Company, and certificate of one whole and one half share of water stock in the Western branch of the Tempe Irrigating Canal Company, and certificate of one whole share and one half share in the Southern branch of the Tempe Irrigating Canal Company; that the said personal property so pledged is of the reasonable value of four thousand dollars ($4,000.00); that the plaintiff has failed and refuses to account to this defendant for said stocks or their values, and has converted the same to its own use, to the defendant's damage in the sum of four thousand dollars ($4,000.00).

Wherefore this defendant prays that he have judgement against the plaintiff:

47

I.

That he be relieved from the payment of any interest on said three promissory notes, as aforesaid.

II.

That he have judgement for his expenditures of forty-five dollars and $\frac{65}{100}$ ($45.65), transcript fee, and five hundred dollars' ($500.00) expenses in prosecuting said suit, and five hundred dollars for work and labor as attorney in prosecuting said suit.

III.

And for five thousand dollars ($5,000.00) and interest according to the tenor and effect of the said five-thousand dollar note, marked "Exhibit A," pleaded as a counter-claim herein.

IV.

And for four thousand dollars ($4,000.00), the value of the said water stocks converted.

V.

And for two thousand dollars' damages, and for costs of suit, and for general relief.

A. J. DAGGS.

A. J. Daggs, being first duly sworn, says that he has read the foregoing answer and knows the contents thereof, and the same is true.

A. J. DAGGS.

Subscribed and sworn to before me this 12th day of October, 1896.

J. E. WALKER, *Clerk.*

48 *Contract.*

It is agreed by and between the Phœnix National Bank and A. J. Daggs, all of Phœnix, Maricopa county, Arizona Territory—that for and in consideration of the giving of certain promissory notes aggregating in the sum of nine thousand seven hundred and forty-one and $\frac{72}{100}$ dollars ($9,741.72) dated Nov. 1st, 1894 and signed by A. J. Daggs and secured *and* by mortgage of date Nov. 28, 1894, on real and personal property described therein, — have sold assigned, transferred and set over unto the said A. J. Daggs all their right, title and interest in and to a certain promissory note signed by W. A. Daggs and P. P. Daggs as partners doing business under the firm, name and style of W. A. & P. P. Daggs and W. A. and P. P. Daggs as individual*ly* for five thousand dollars ($5,000.00) and secured *on* first mortgage on 35,000 sheep in Coconino county, Arizona Territory and given by aforesaid W. A. and P. P. Daggs partners, and W. A. and P. P. Daggs individuals to Thos. Armstrong, Jr. and now owned by the Phœnix National Bank of Phœnix, Arizona Territory, and which said note of five thousand dollars ($5,000.00) is dated July 1st, 1893 and bears interest at the rate of 1 and $\frac{1}{4}$ per cent. per month payable quarterly, and which said nine thousand seven hundred and forty-one and $\frac{73}{100}$ ($9,741.73) dollar note is received in full payment for the said five-thousand-dollar note hereinbefore described.

It is agreed that the said five-thousand-dollar note herein described is now in litigation between the Phœnix National
49 Bank of Phœnix, Arizona Territory and Hugh McCrum of San Francisco, California, and the assignee, D. A. Abrams as assignee of the Bank of Tempe, of Tempe, Arizona Territory to establish and determine the priorities of rights under mortgage between the said litigants hereinbefore mentioned which said cause of action and rights of the Phœnix national bank under its first mortgage in said litigation described, is also hereby sold, assigned, transferred and set over unto A. J. Daggs for the above nine thousand seven hundred and forty-one and $\frac{73}{100}$ dollars ($9,741.73).

It is further agreed that the aforesaid cause of action described, shall be continued in the name of the Phœnix national bank until the case is determined and settled, but it is further agreed that from

this date, Nov. 1st, 1894, A. J. Daggs shall pay the costs that shall hereafter accrue in the said cause.

Dated this 28th day of November, 1894.

THE PHŒNIX NATIONAL BANK.
By JAMES A. FLEMING, *President.*
A. J. DAGGS.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
R. E. DAGGS, A. J. DAGGS, ET AL., Defendants. } Answer.

50 Come the defendants and for answer to the plaintiff's complaint:

I.

Accept to the sufficiency of the said complaint because the said complaint does not state facts sufficient to constitute a cause of action.

II.

Should the defendants' demurrer be by the court overruled, the defendants, further answering, deny each and every allegation therein contained except the execution of the instruments sued on.

A. J. DAGGS,
Att'y for Defendant- R. E. Daggs & A. J. Daggs.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, BENJAMIN GOLDMAN, JAMES C. Goodwin, & R. E. Daggs, Defendants. } Amended Answer.

Comes the defendant Benjamin Goldman and for amended answer to plaintiff's complaint denies all and singular the
51 allegations thereof, except the allegation that said defendant claims an interest or lien in a portion of the land and premises described in plaintiff's complaint, to wit: The westerly one hundred acres of the northwest quarter of section nineteen (19), township one (1) south, of range two east, situate in the county of Maricopa, Territory of Arizona, and the northwest quarter of section thirty-five (35), township one (1) south, of range four (4) east, situate in Maricopa county, Arizona Territory, but denies that said interest and lien is subject to the lien of plaintiff's mortgage.

And for a cross complaint herein said defendant avers that the plaintiff is a corporation duly organized under the national banking laws of the United States and has its office and principle place of doing business at Phœnix, Maricopa county, Arizona Territory;

that A. J. Daggs and R. E. Daggs are residents of the county of Maricopa, Territory of Arizona.

That on the 18th day of February, 1894, and for a long time prior thereto, this defendant was the owner of the westerly one hundred acres of the northwest quarter, section nineteen (19), T. 1 S., R. 5. E., and the northwest quarter of section 35, T. 1 S, of R. 4 E., situate in Maricopa county, Arizona Territory, and being a portion of the real estate described in plaintiff's complaint.

That on said date this defendant sold said premises and land to R. E. Daggs, W. A. Daggs, and P. P. Daggs for the sum of $2.600.00, for which purchase-money said W. A. Daggs and P. P. Daggs executed and delivered to the defendant their certain promissory notes, signed by them under the firm name and style of W. A.
52 Daggs and P. P. Daggs," as follows, to wit: One note for the sum of one thousand dollars, of date February 8th, 1894, payable three months after date, with interest, at the rate of one per cent. per month, from said date until paid.

One note for $950.00, of date February 8th, 1894, payable in ninety days from date, with interest, at the rate of one per cent. per month, from date until paid.

One note for $650.00, due in ninety days, with interest, at the rate of one per cent. per month, from its date until paid.

That in making the conveyance of said real estate this defendant, at the request of said W. A. Daggs and P. P. Daggs, made such conveyance to the defendant R. E. Daggs, a brother of said Daggs, and so vested the title to said premises in said R. E. Daggs, and said R. E. Daggs accepted said conveyance well knowing all the premises and well knowing that said W. A. Daggs and P. P. Daggs had not paid, and that he himself had not paid, any of the purchase-money for said land to this defendant; that no valuable or other consideration ever passed from any of the said Daggs for said conveyance.

And this defendant further avers that on or about the 17th day of March, 1894, W. A. Daggs, P. P. Daggs, R. E. Daggs, and A. J. Daggs confederated and combined with each other, and with one A. L. Johns, to make, and did cause to be made, for the purpose of wronging and defrauding this defendant and depriving him of his vendor's lien upon said premises and of the purchase price thereof, a conveyance from said R. E. Daggs to said A. L. Johns of the westerly one hundred acres of the N. W. quarter of section nineteen
(19), T. 1 S., R. 5 E., and this defendant avers that the said
53 conveyance was without consideration, and was received by said Johns with full knowledge of the facts hereinbefore set out and with full knowledge that neither of the aforesaid Daggses had paid the purchase-money of said land to this defendant.

And this defendant further avers that the said Daggses and the said Johns, confederating and combining with each other and with another of said Daggses, to wit, one A. J. Daggs, a brother of the aforesaid Daggses, for the purpose of wronging and defrauding this defendant and depriving him of his vendor's lien upon said premises, caused the said Johns to make to the said A. J. Daggs, on or about

the 3rd day of April, 1894, a conveyance of said premises, which said conveyance was made without consideration and was received by said A. J. Daggs with full knowledge of all the facts hereinbefore set out, and with full knowledge that neither of the aforesaid Daggses or the said Johns had paid any of the purchase price of said land.

And this defendant further avers that on or about the 17th day of March, 1894, the said W. A. Daggs, P. P. Daggs, and R. E. Daggs combined and confederated with each other and with the said A. J. Daggs to make, and thereupon did make and caused to be made, for the purpose of wronging and defrauding this defendant and depriving him of his vendor's lien upon the northwest quarter of section thirty-five (35), T. 1 S., of R. 4 E., a conveyance from said R. E. Daggs to said A. J. Daggs of said premises; that said deed was made without consideration, was received by said A. J. Daggs
54 with full knowledge of the facts hereinbefore set forth and with full knowledge that no part of the purchase-money had been paid to this defendant for said land.

That no part of the sums mentioned in the aforesaid promissory notes have been paid.

That on the 17th day of May, 1894, in the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa, this defendant commenced suit against the aforesaid Daggses to establish and foreclose a vendor's lien in the sum of $1,600.00, besides interest and costs, upon the northwest quarter of section thirty-five (35), T. 1 S., R. 4 E., which said suit was numbered 1992, and on said date, in said court, this defendant commenced suit against the aforesaid Daggses and A. L. Johns to establish and foreclose a vendor's lien in the sum of $1,000.00, besides interest and costs, upon the westerly one hundred acres of the northwest quarter of section 19, T. 1 S., R. 5 E, which said suit was numbered 1983, and said lands described in said suits being the lands hereinbefore described and being a portion of the lands described in plaintiff's complaint herein, and said sums in said suits mentioned being the purchase price of said lands.

That upon the 18th day of May, 1894, this defendant caused to be filed in the office of the county recorder of the county of Maricopa, Territory of Arizona, a notice of the pendency of the said action No. 1982, in which notice was described the purposes of said suit and the land effected thereby, to wit, the said northwest
55 quarter of section 35, T. 1 S., R. 4 E., which said notice was on said day duly recorded in Book 1 of *Lis Pendens*, pages 141 and 142, in the office of the said county recorder.

That on said date this defendant caused to be filed in the said county recorder's office a notice of the pendency of the said action No. 1983, in which notice was described the purposes of said suit and the land effected thereby, to wit, the said westerly 100 acres of the northwest quarter of section nineteen (19), T. 1 S., R. 5 E., which said notice was on said day duly recorded in Book 1 of *Lis Pendens*, pages 140 and 141, in the office of said county recorder.

That the said suits numbered 1982 and 1983 are each of them still pending and undetermined.

That on the 28th day of November, 1894, the date of the execution of the mortgage set out and described in plaintiff's complaint herein, and ever since the said 18th day of May, 1894, said plaintiff had full and complete notice that the purchase price of said westerly 100 acres of the northwest quarter of section nineteen (19), T. 1 S., R. 5 E., and the northwest quarter of section thirty-five (35), T. 1 S., R. 4 E., had not been paid to this defendant by either of the said Daggs or the said Johns, and that this defendant claimed a vendor's lien therefor upon said land, and that suits to foreclose the same were then pending upon said lands, and that said plaintiff took and received the aforesaid mortgage upon said land subject to the aforesaid vendor's lien of this defendant.

Wherefore this plaintiff prays:

56 First. That the said W. A. Daggs and P. P. Daggs be made parties hereto.

Second. That he have judgment establishing and foreclosing a vendor's lien upon the property hereinbefore described for the sum of $2,600.00, with interest from February 8th, 1894, at the rate of one per cent. per month, and for a reasonable attorney's fee here and for costs.

Third. That said vendor's lien be declared prior to that of plaintiff's mortgage, and that the said lands be ordered sold in satisfaction thereof, and for such other and further relief in the premises as may seem meet and equitable.

FITCH & CAMPBELL,
Att'ys for Defendant Goldman.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, BENJAMIN GOLDMAN, JAMES C. GOODWIN, & R. E. DAGGS, Defendants.
} Amended Answer.

Comes the defendant James C. Goodwin and for amended answer to plaintiff's complaint denies all and singular the allega-

57 tions thereof except the allegation that said defendant claims an interest or lien in a portion of the land and premises described in plaintiff's complaint, to wit, the southwest quarter of section 22, T. 1 S., R. 4 E., situate in Maricopa county, Arizona Territory, but denies that it is subject to the lien of plaintiff's mortgage.

And for a cross-complaint herein said defendant avers that the plaintiff is a corporation duly organized under the banking laws of the United States and has its principle office and place of business at Phœnix, Maricopa county, Arizona Territory.

That defendants are residents of Maricopa county, Arizona Territory.

That on the 28th day of January, 1894, and for a long period of time prior thereto, this defendant was the owner of the southwest quarter of section 22, T. 1 S., R. 4 E., being a portion of the land described in plaintiff's complaint.

That on said date this defendant sold said premises to R. E. Daggs, W. A. Daggs, and P. P. Daggs for the sum of $1,568.64, for which purchase said W. A. Daggs and P. P. Daggs made, executed, and delivered to this defendant their certain promissory notes, signed by them under the firm name of W. A. Daggs and P. P. Daggs, as follows, to wit: One note for $259.52, dated January 29th, 1894, payable three months after date, with interest thereon, at the rate of one per cent. per month, from said date.

One note, of same date, for $409.84, payable six months after date, with interest thereon, at the rate of two per cent. per month,
58 until paid, compounding quarterly; one note for $300.00, same date, payable four months after date, with interest at the rate of one per cent. per month, compounding quarterly.

One note for $621.80, of the same date, payable three months after date, with interest at the rate of one per cent. per month, interest compounding quarterly.

That in making a conveyance of said property, at the request of said W. A. Daggs and P. P. Daggs, this defendant made such conveyance to the defendant R. E. Daggs and so vested the title to said premises in said R. E. Daggs, and said R. E. Daggs accepted said conveyance, well knowing all the premises and well knowing that said W. A. Daggs and P. P. Daggs had not paid and that he himself had not paid any of the purchase-money for said land, and this defendant avers that no valuable consideration has ever passed from any of the Daggses for said conveyance.

This defendant further avers that on or about the 17th day of March, 1894, said Daggses confederated and combined with each other and with one M. E. Campbell to make and did thereupon make, for the purpose of wronging and defrauding this defendant and depriving him of his vendor's lien upon the said premises, a conveyance from the said R. E. Daggs to said M. E. Campbell of said premises; that said conveyance to said Campbell was without consideration and was recorded by him with full knowledge hereinbefore set out and *will* full knowledge that the said R. E. Daggs, W. A. Daggs, and P. P. Daggs had not paid the purchase-money for said lands.

And this defendant further avers that further confeder-
59 ating and combining with each other, as aforesaid, and for the purpose of wronging and defrauding this defendant and depriving him of his vendor's lien upon said land, the aforesaid Daggses and Campbell and one A. J. Daggs caused the said Campbell to make to said A. J. Daggs, a brother of the aforesaid other Daggses, on or about the 3rd day of May, 1894, a conveyance of said land, which said conveyance was without consideration and was recorded by said A. J. Daggs with full knowledge of all the

facts hereinbefore set forth and will full knowledge that neither of the other Daggses or the said Campbell had paid the purchase price of said land.

That no part of the sums mentioned in the promissory notes has been paid.

That on the 17th day of May, 1894, in the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa, this defendant commenced suit against the aforesaid Daggses to establish and foreclose a vendor's lien in the sum of $1,588.81, besides interest and costs, upon the said southwest quarter of section 22, T. 1 S., R. 4 E.; that upon the 18th day of May, 1894, this defendant caused to be filed in the office of the county recorder of the county of Maricopa a notice of the pendency of said action, in which notice was described the purposes of said suit and the land effected thereby, to wit, the land above described, which said notice was on said day duly recorded in Book 1 of *Lis Pendens*, page 140, in the office of the said county recorder; that said suit is still pending and undetermined.

That on the 28th day of November, 1894, the date of the
60 execution of the mortgage set out and described in plaintiff's complaint herein, and ever since the said 18th day of May, 1894, said plaintiff had full and complete notice that the purchase price of the above-described land had not been paid to this defendant by either of the said Daggses or the said Campbell, and that this defendant claimed a vendor's lien therefore upon said land, and that suit was then pending to foreclose the same.

That said plaintiff took and received the aforesaid mortgage upon said land subject to the aforesaid vendor's lien of this defendant.

Wherefore this defendant prays:

First. That the said W. A. Daggs and P. P. Daggs be made parties hereto.

Second. That he have judgement establishing and foreclosing a vendor's lien upon the land hereinbefore described for the sum of $1,588.84, with interest according to the terms of the aforesaid promissory notes, for a reasonable attorneys' fee herein, and for costs.

Third. That the said vendor's lien be declared prior to that of plaintiff's mortgage, and that said land be ordered sold in satisfaction thereof, and for such other and further relief as in the premises may seem meet and equitable.

FITCH & CAMPBELL,
Att'ys for Goodwin.

61 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, BENJAMIN GOLDMAN, JAMES C. GOODWIN, & R. E. Daggs, Defendants. } Answer.

Come the defendants Goldman and Goodwin and for answer deny all and singular the allegations of plaintiff's complaint.

FITCH & CAMPBELL,
Attorneys for Defendants.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, BENJAMIN GOLDMAN, JAMES C. Goodwin, & R. E. Daggs, Defendants. } Demurrer to Answer.

62 Now comes the plaintiff and demurs to the answer of the defendant Benjamin Goldman on file herein, and for cause of demurrer alleges that said answer does not state facts sufficient to constitute a defence to plaintiff's complaint on file herein or to establish a lien prior to the mortgage issued upon by the plaintiff in this action.

Wherefore plaintiff prays that it may have judgement in this court upon its said complaint, in accordance with its prayer therein, and have such other relief as to the court may seem just and equitable in the premises.

L. H. CHALMERS,
Att'y for Plaintiff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, BENJAMIN GOLDMAN, JAMES C. GOODWIN, & R. E. Daggs, Defendants. } Demurrer.

Comes now the plaintiff and demurs to the answer of the defendant James C. Goodwin, on file herein, and for cause of demurrer alleges that said answer does not state facts sufficient to constitute a defence to plaintiff's complaint on file herein, or to establish a lien prior to the mortgage sued upon by the plaintiff in this action.

63 Wherefore plaintiff prays that it may have judgement in this court upon its complaint in accordance with its prayer

therein, and have such other relief as to the court may seem just and equitable in the premises.

L. H. CHALMERS,
Att'y for Plaintiff.

Copy.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS & R. E. DAGGS, Defendants.
No. 2555. Plea in Abatement.

By leave of court first had and obtained, defendants file this their plea in abatement herein.

II.

Defendants come and plead to plaintiff's cause of action herein and say that before the commencement of this suit, to wit, on the 21st day of February, 1896, the plaintiffs sued them in the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa in case No. 2554, in an action
64 on the same three promissory notes, the same cause of action set forth in this cause (case No. 2555), as appears by the record of said suit remaining in said court, which prior suit still remains undetermined.

Wherefore defendants pray that this suit abate and for *his* costs herein expended.

A. J. DAGGS,
Att'y for Defendants.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, Defendant.
Motion for Judgement. No. 2555.

Comes the defendant, A. J. Daggs, and moves the court for judgement upon his counter-claims in this action:

I.

Because the counter-claims are confessed by the plaintiff.

II.

Because there is no reply to defendant's counter-claims.

A. J. DAGGS, *Pro Se.*

65&66 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, Defendant. } Complaint.

The plaintiff, for cause of action, complains and alleges—

That the plaintiff is a corporation organized and existing under the laws of the United States of America; that the defendant is a resident of Phœnix, Maricopa county, Arizona Territory.

That on the first day of November, A. D. 1894, the defendant executed to the plaintiff three certain promissory notes, one of said notes bearing date the first day of Nov., A. D. 1894, as aforesaid, for the sum of six thousand dollars, payable on or before one year from date of execution, with interest thereon, at the rate of ten per cent. per annum, from date of execution until paid; one of said notes bearing date November 1st, 1894, as aforesaid, for the sum of twelve hundred forty-one and $\frac{73}{100}$ dollars, payable on or before one year from date of execution, with interest, at the rate of ten per
67 cent. per annum, from date of execution until paid; one of said notes bearing date November 1st, 1894, as aforesaid, for the sum of twenty-five hundred dollars ($2,500.00), payable on or before one year from date of execution, with interest, at the rate of ten per cent. per annum, from date of execution until paid.

That, in order to secure the payment of said above-described notes, the said A. J. Daggs afterwards, to wit, on the 28th day of November, A. D. 1894, executed to the plaintiff a mortgage upon certain real property in the county of Maricopa, described as follows, to wit: Lots number one (1) and two (2) of block No. 51 of the town of Tempe, Maricopa county, Territory of Arizona, with all the appurtenances thereunto belonging.

Which said mortgage was duly acknowledged and certified so as to entitle it to be recorded, and the same was afterwards, to wit, on the 28th day of November, 1894, duly recorded in the office of the county recorder of the county of Maricopa, in Book 21 of Mortgages, pages 34 and 35, a copy of which said mortgage, with the endorsements thereon, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

That the plaintiff, The Phœnix National Bank, is now the lawful owner and holder of said promissory notes and mortgage herein described, and that no part of the principal or interest of the said notes or either of them, or of the said mortgage, has been paid.

That the said notes and mortgage provide for an attorney's fee of two per cent. on the amount found due in any suit to recover
68 on said notes or mortgage.

Wherefore the plaintiff demands judgement against the defendant for the sum of nine thousand seven hundred and forty-one dollars and $\frac{73}{100}$ ($9,741.73), with interest thereon, at the rate of ten per cent. per annum, from the first day of November, 1894, and for the further sum of two per cent. upon the amount found due upon

said notes as attorneys' fees and for the costs of suit, and that the whole of said judgement be made payable in gold coin of the United States, and that the usual decree may be made for the sale of said premises for gold coin of the United States by the sheriff of the county of Maricopa, according to law and the practice of the court; that the proceeds of said sale in gold coin of the United States may be applied to the payment of the amount due upon said notes and mortgage for principal, interest, costs, and expenses of the sale, and that the defendant and all persons claiming under him subsequent to the execution of said mortgage on said premises, either as purchasers, encumbrancers, or otherwise, may be barred and foreclosed of all right or equity of redemption to said premises and every part thereof, and that said plaintiff may have judgement against said defendant for any deficiency which may remain after applying all the proceeds of the sale of said premises applicable to the satisfaction of the said judgement, and that the plaintiff or any other parties to this suit may become purchasers at such sale; that the sheriff execute a deed to the purchaser at such sale, and that said
69 purchaser be let into the premises on production of the sheriff's deed therefor, and that the plaintiff may have such other and further relief in the premises as to the court may seem meet and equitable.

L. H. CHALMERS,
Att'y for Plaintiff.

"EXHIBIT A."

Realty Mortgage.

Know all men by these presents: That I, A. J. Faggs, mortgagor, of Phœnix, county of Maricopa, Territory of Arizona, for and in consideration of nine thousand seven hundred and forty-one dollars and $\frac{73}{100}$, to me in hand paid by the Phœnix National Bank of Phœnix, Maricopa county, Arizona Territory, mortgagee, have granted, sold and conveyed and by these presents do grant, sell and convey unto the said The Phœnix National Bank all that certain premises described as follows to wit: Lots number one (1) and two (2) of block number fifty-one (51) of the town of Tempe, Maricopa county, Territory of Arizona, with all the appurtenances thereunto belonging.

To have and to hold the above-described premises together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said The Phœnix National Bank, and its assigns forever.

This conveyance is intended as a mortgage to secure the
70 payment of three certain promissory notes given by me of date November 1st, 1894; which said notes are in words and figures following, to wit:

No. —. PHŒNIX, ARIZONA, *Nov. 1st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay to the Phœnix national bank or order, the

sum of twelve hundred and forty-one $\frac{73}{100}$ dollars in U. S. gold coin, with interest thereon in like gold coin, at the rate of ten per cent. per annum from date until paid. Interest payable annually. All payable at Phœnix, in Maricopa county, Arizona. And in case suit is brought on this note I agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$1,241.73. A. J. DAGGS.

Due —— —, 189–.

No. —. PHŒNIX, ARIZONA, *Nov.* 1*st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay to the Phœnix national bank or order the sum of twenty-five hundred dollars in U. S. gold coin, with interest thereon in like gold coin at the rate of ten per cent. per annum from date until paid. Interest payable annually. All payable at Phœnix in Maricopa county, Arizona. And in case suit is brought on this note I agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$2,500.00. A. J. DAGGS.

Due —— —, 189–.

No. —. PHŒNIX, ARIZONA, *Nov.* 1*st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay to the Phœnix national bank or order the sum of six thousand dollars in U. S. gold coin, with interest thereon in like gold coin, at the rate of ten per cent. per annum from date until paid. Interest payable annually. All payable at Phœnix in Maricopa county, Arizona. And in case suit is brought hereon I further agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$6,000.00. A. J. DAGGS.

Due —— —, 189–.

71 And this instrument shall be void if said promissory notes principal, and interest be well and truly paid when due, according to the tenor and effect thereof. But it is distinctly understood and agreed that if the interest on said promissory notes, or the principal thereon, shall not be punctually paid when the same shall become due, as in said promissory note mentioned, then, and in such case, the principle sum of said notes, and the interest thereon, shall be deemed and taken to be wholly due and payable, and proceedings may forthwith be had by the said mortgagee, the Phœnix national bank, its heirs, executors, administrators, and assigns for the recovery of the same, either by suit on said notes or on this mortgage and notes; and in any suit or other proceedings that may be had for the recovery of the said principal sum and interest thereon, it shall and may be lawful for the said mortgagee, its heirs, executors, administrators or assigns, to include in the judgement that may be recovered attorneys' fees not exceeding two per

cent. thereon, upon the amount found due the plaintiff on said notes and this mortgage, or in case of settlement after suit brought, but before judgement rendered, then one per cent. on amount found due at the time of settlement, as well as all payments that the said mortgagee its heirs, executors, administrators or assigns may be obliged to make for its security, or on account of any taxes, charges, incumbrances or assessments whatsoever on the said premises, legally laid or made thereon.

72 Witness my hand this 28th day of November, A. D. 1894.

A. J. DAGGS. [SEAL.]

Signed, sealed, and delivered in the presence of—

—— ——.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Before me, L. H. Chalmers, a notary public in and for the county of Maricopa, Territory of Arizona, on this day personally appeared A. J. Daggs, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 28th day of November, A. D. 1894.

L. H. CHALMERS,
Notary Public.

[NOTARIAL SEAL.]

Endorsements: No. 7797. Realty mortgage from A. J. Daggs to the Phœnix national bank, dated Nov. 15th, 1894. Filed and recorded at request of L. H. Chalmers, November 28th, 1894, at 4.27 p. m., Book 21 of Mortgages, pages 34 and 35. Neir Osborn, county recorder, by H. C. Meador, deputy recorder.

73 TERRITORY OF ARIZONA, }
County of Maricopa. }

I, Neir Osborn, county recorder in and for county and Territory aforesaid, do hereby certify that the within instrument was filed for record at 4.27 o'clock p. m. on this 28th day of Nov., 1894, and duly recorded in Book No. 21 of Mortgages, records of Maricopa county, Arizona, at pages 34 and 35.

Witness my hand and official seal the day and year above written.

[County Recorder's Seal.]

NEIR OSBORN,
County Recorder,
By H. C. MEADOR,
Deputy Recorder.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, Defendant.

Action brought in the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa, and the complaint filed in said Maricopa county, in the office of the clerk of said district court.

74 In the name of the Territory of Arizona to A. J. Daggs, defendant, Greeting:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the district court of the third judicial district of the Territory of Arizona in and for Maricopa county, and answer the complaint therein filed with the clerk of this said court, at Phœnix, in said county, within ten days after the service upon you of this summons, if served in this said county, or if served out of this said county and within this said judicial district, then within twenty days thereafter, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgement by default will be taken against you.

Given under my hand and seal of the district court of the third judicial district of the Territory of Arizona in and for Maricopa county, this 25th day of February, A. D. 1896.

[SEAL.]

J. E. WALKER,
Clerk of said District Court,
By C. H. KNAPP,
Deputy Clerk.

OFFICE OF THE SHERIFF OF THE COUNTY OF MARICOPA.

I hereby certify that I received the within summons on the 25th day of February, A. D. 1896, at the hour — 10.30 a. m., and personally served the same on the 25th day of February, A. D. 1896, on A. J. Daggs, he being the said defendant named in said summons;
75 to which was attached a true copy of the complaint mentioned in said summons.

Dated this 25th day of February, A. D. 1896.

G. H. ORME, *Sheriff,*
By —— ——, *Deputy.*

Fees.

Service	$1.50
Copies	.60
Travel, 1 mile	.30
Publication	
Total	$2.40

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, Defendant. } Answer.

Comes the defendant, and for answer to the plaintiff's complaint—

I.

Demurs because the said complaint does not state facts sufficient to constitute a cause of action.

II.

Should the defendant's demurrer be by the court overruled, the defendant, further answering, denies each and every allegation in the said complaint contained except the instruments sued on.

A. J. DAGGS, *Pro Se.*

76 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS ET AL., Defendants. } Amended Answer.

Should defendants' pleas in abatement and demurrers be by the court overruled, the defendant A. J. Daggs, answering separately by his amended answer, denies each and every allegation in said complaint contained not hereinafter admitted or otherwise pleaded.

I.

This defendant admits the residence of A. J. Daggs.

II.

This defendant admits the execution of the three promissory notes, as alleged, and the execution of the mortgages to secure the same by defendant A. J. Daggs, as alleged.

III.

This defendant admits that the three promissory notes sets forth and sets out that they shall bear interest at the rate of ten per cent. per annum from date until paid upon the amounts in each of said notes expressed.

IV.

77 This defendant, for his first defense and his defense to the interest on said notes, alleges that the said notes are tainted with usury, for that there is no rate of interest fixed by law in Arizona Territory or by title XXXVIII, entitled "Interest of

Revised Statute" thereof, governing notes and bills or other evidences of debts, except after maturity, and that the interest so set out and charged in the first instance in said notes exceeds that rate of seven dollars per hundred dollars per year, and exceeds the rate of seven per cent. per annum, contrary to the form of the statute in such cases made and provided and contrary to the United States banking act and to sections 5197 and 5198 thereof, and the said interest was charged and contracted for on part of the plaintiffs with full knowledge of said sections of said United States banking act and knowingly in violation of said act and in defiance of sections 5197 and 5198 thereof. Wherein and whereby and by force of said United States banking act and of sections 5197 and 5198 of said statute the plaintiff forfeited its right to receive, collect, or recover in any manner of or from this defendant the interest on said three promissory notes or the value of the interest thereon.

Wherefore this defendant asks to be relieved and discharged from the payment of any interest on said notes or either of them, and prays judgement accordingly.

V.

This defendant, for another answer and counter-claim to plaintiff's complaint, alleges—

First. That the plaintiff is indebted to this defendant upon a certain promissory note executed by W. A. and P. P. Daggs
78 as copartners, and by W. A. and P. P. Daggs as individuals, and delivered to Thos. Armstrong, Jr., and assigned by said Thos. Armstrong, Jr., in blank to the plaintiff, and said note was, on the 28th day of November, A. D. 1894, for a valuable consideration in writing, assigned by the plaintiff to this defendant, and at the time of said assignment the makers of said note were and ever since have been and are now notoriously insolvent, all of which plaintiff well knew, which note is in words and figures as follows, to wit, and marked "Exhibit A," and made a part hereof:

No. 1340. Due Sept. 1st.

$5,000.00. PHŒNIX, ARIZONA, *July 1st*, 1893.

On the 1st day of September, 1893, without grace, we or either of us, for value received, promise to pay to Thos. Armstrong, Jr., at the Phœnix national bank, at their office in Phœnix, Arizona, five thousand dollars ($5,000) in United States gold coin, with interest, at the rate of 1 and ½ per cent. per month, until paid. In case of legal proceedings hereon, we or either of us agree to pay 10 per cent. of amount due hereon as attorney's fees.

W. A. AND P. P. DAGGS.

Secured by chattel mortgage of even date herewith.

W. A. DAGGS.
P. P. DAGGS.

And endorsed on the back as follows:

Thos. Armstrong, Jr. Sept. 30th, 1893, interest from July 1st to Oct. 1st, 1893, $187.50. Dec. 30th, 1893, interest from Oct. 1st,

'93, to Jan'y 1st, 1894, $187.50. April 2nd, 1894, interest from Jan'y 1st to April 1st, $187.50.

Second. And no part of said note has been paid since the said assignment by the plaintiff to this defendant, and there is now due thereon the sum of seven thousand and seventy-six and $\frac{91}{100}$ dollars ($7,076.91).

Wherefore the defendant prays judgement against the
79 plaintiff for the sum of seven thousand and seventy-six and $\frac{91}{100}$ dollars ($7,076.91) and costs of suit, the value of said note and interest thereon according to the tenor and effect of said note.

VI.

This defendant for another and further defense to plaintiff's complaints answers and alleges:

That at the time of the execution of the three promissory notes mentioned in plaintiff's complaint the plaintiff and this defendant entered into a contract on writing, a copy of which is hereto attached and made a part hereof and marked "Exhibit B," wherein the plaintiff, as a part of the consideration of the three said promissory notes, sold and assigned and expressly stipulated that the three said promissory notes should be received in payment for all its right, title, and interest in and to that certain right in action whereiff Hugh McCrum was plaintiff and W. A. and P. P. Daggs *was* defendant- and plaintiff was intervenor over that certain five-thousand-dollar note marked "Exhibit A" herein and mortgage securing the same.

That at the time of the said purchase and assignment of the said right in action involving the said five-thousand-dollar note and mortgage, as aforesaid, the makers of said note were and ever since have been and are now actually and notoriously insolvent, all of which the plaintiff well knew, and it was further agreed between the plaintiff and this defendant that the said litigation and suit aforesaid should be carried on in the name of plaintiff until the said cause of action should be determined and settled, and
80 that plaintiff should pay all costs of said litigation accrueing prior to November 1st, 1894, and this defendant should bear all costs accrueing thereafter. Defendant says that he has paid out and expended large sums of money in the prosecution of said suit, to wit, forty-five and $\frac{63}{100}$ dollars ($45.63) as transcript fee from court below and the sum of five hundred dollars ($500.00) as costs, and expended work and labor of the reasonable value *and* more than five hundred dollars ($500), and duly performed all the conditions of said contract on his part, but that the plaintiff has failed and refused to perform the conditions of its said contract, in this:

That it has failed to pay the expenses that accrued prior to Nov. 1st, 1894, to wit, the transcript fee aforesaid, and has wholly failed and refused to allow its name to be used in the continuation of the said suit, and wholly failed and refused to sign the bond in appeal to court of last resort as principal, all to defendant's damage in the

sum of ten thousand one hundred and twenty-two and $\frac{55}{100}$ dollars ($10,122.55).

VII.

This defendant for another and further defense to plaintiff's complaint answers and alleges that he pledged personal property as security to the said promissory notes with the plaintiff as follows: Certificate to one whole share of water stock in the Tempe Irrigating Canal Company, and certificate of one whole and one half shares of water stock in the Western branch of the Tempe Irrigating Canal Company, and certificate of one whole and one
81 half shares of water stock in the Southern branch of the Tempe Irrigating Canal Company; that the said personal property so pledged is of the reasonable value of four thousand dollars ($4,000.00); that the plaintiff has failed and refuses to account to this defendant for said stocks or their values, and has converted the same to its own use, to the defendant's damage in the sum of four thousand dollars ($4,000.00).

Wherefore this defendant prays that he have judgement against the plaintiff.

I.

That he be relieved from the payment of any interest on said three promissory notes, as aforesaid.

II.

That he have judgement for his expenditures of forty-five dollars and $\frac{65}{100}$ ($45.65) transcript fee, and five hundred dollars' expenses in prosecuting said suit, and five hundred dollars for work and labor as attorney in prosecuting said suit.

III.

And for five thousand dollars ($5,000.00) and interest according to the tenor and effect of the said five-thousand-dollar note, marked "Exhibit A," pleaded as a counter-claim herein.

IV.

And for four thousand dollars ($4,000.00), the value of the said water stocks converted.

V.

82 And for two thousand dollars' damages and for costs of suit and for general relief.

A. J. DAGGS.

A. J. Daggs, being first duly sworn, says that he has read the foregoing answer and knows the contents thereof, and the same is true.

A. J. DAGGS.

Subscribed and sworn to before me this 12th day of October, 1896.

J. E. WALKER, *Clerk.*

Contract.

It is agreed by and between the Phœnix National Bank and A. J. Daggs, all of Phœnix, Maricopa county, Arizona Territory, that for and in consideration of the giving of certain promissory notes aggregating in the sum of nine thousand seven hundred and forty-one and $\frac{73}{100}$ dollars ($9,741.73) dated November 1st, 1894, and signed by A. J. Daggs and secured by mortgage of date Nov. 28th, 1894, on real and personal property described therein, have sold, assigned, transferred and set over unto the said A. J. Daggs all their right, title and interest in and to a certain promissory note signed by W. A. Daggs and P. P. Daggs as partners doing business under the firm name and style of W. A. & P. P. Daggs and W. A. Daggs and P. P. Daggs as individually for five thousand dollars ($5,000.00) and secured of first mortgage on 35,000 sheep in Coconino
83 county, Arizona Territory, and given by aforesaid W. A. and P. P. Daggs partners, and W. A. and P. P. Daggs individuals to Thos. Armstrong Jr. of Maricopa county, Arizona Territory and endorsed by said Thos. Armstrong Jr. and now owned by the Phœnix National Bank of Phœnix, Arizona Territory, and which said note of $5,000.00 is dated July 1st 1893, and bears interest at the rate of 1 and $\frac{1}{4}$ per cent. per month payable quarterly, and which said nine thousand seven hundred and forty-one and $\frac{73}{100}$ dollar note is received in full payment for the said five-thousand-dollar note hereinbefore described.

It is agreed that the said five-thousand-dollar note herein described is now in litigation between the Phœnix National Bank of Phœnix, Arizona Territory, and Hugh McCrum of San Francisco, California, and the assignee D. A. Abrams, as assignee of the Bank of Tempe, of Tempe, Arizona Territory, to establish and determine the priorities of rights under mortgage between the said litigants hereinbefore mentioned which said cause of action and rights of the Phœnix National Bank under its first mortgage in said litigation described is also hereby sold, assigned, transferred and set over unto A. J. Daggs for the above nine thousand seven hundred and forty-one dollars and $\frac{73}{100}$ ($9,741.73).

It is further agreed that the aforesaid cause of action described shall be continued in the name of the Phœnix National Bank until the said case is determined and settled but it is further agreed that from this date, Nov. 1st, 1894, A. J. Daggs shall pay the
84 costs that shall hereafter accrue in the said case.

Dated this 28th day of November, 1894.

THE PHŒNIX NATIONAL BANK,
By JAMES A. FLEMING, *President.*
A. J. DAGGS.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, Defendant. } Answer.

Now comes the plaintiff and, for answer to the counter claim set out in the amended answer on file herein, demurs to the said counter-claim on the ground that it does not state facts sufficient to constitute a cause of action.

Should said demurrer be overruled, plaintiff, further answering, denies each and every allegation in said counter claim contained, and of this puts itself upon the country.

Wherefore plaintiff prays that the defendant take nothing by reason of *their* counter-claim, and that plaintiff recover upon its complaint herein.

L. H. CHALMERS,
Att'y for Plaintiff.

85 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, Defendant. } Plea in Abatement. No. 2556.

By leave of court first had and obtained, defendant files this his plea in abatement herein.

II.

Defendant comes and pleads to plaintiff's cause of action herein, and says that before the commencement of this suit, to wit, on the 21st day of February, 1896, the plaintiff sued him in the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa, in case No. 2554, in an action on the same three promissory notes, the same cause of action set forth in this cause (case No. 2556), as appeared by the record of said suit remaining in said court, which said suit still remains undetermined.

Wherefore defendant prays that this suit abate, and for his costs herein expended.

A. J. DAGGS, *Attorney.*

86 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, Defendant. } No. 2556. Motion for Judgement.

Comes the defendant A. J. Daggs and moves the court for judgement upon his counter-claims in this action—

I.

Because the counter-claims are confessed by the plaintiff.

II.

Because there is no reply to defendant's counter-claims.

A. J. DAGGS, *Pro Se.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, *vs.* A. J. DAGGS ET AL., Defendant-. } Cases No. 2554, 2555, & 2556. Memorandum of Costs and Disbursements.

Disbursements.

Sheriff's fees.....
Clerk's fees..... $25.05
87 Witness fees..... .....
Stenographer's fees..... 18.00

TERRITORY OF ARIZONA, *County of Maricopa,* } *ss:*

R. E. Daggs, being duly sworn, deposes and says that he is agent for the defendants in the above-entitled action, and as such is better informed relative to the above costs and disbursements than the said defendants; that the items in the above memorandum contained are correct, and that the said disbursements have been necessarily incurred in the said action.

R. E. DAGGS.

Subscribed and sworn to before me this 10th day of Jan'y, 1898.
EDWIN S. GILL, *Clerk,*
By —— ——, *Deputy.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, *vs.* A. J. DAGGS & R. E. DAGGS ET AL., Defendants. } Motion to Bring in Other Parties.

88 Comes the defendant herein and moves the court to compel the plaintiffs to bring in Thompson Walker, P. B. Carley, J. H. Guyer, Henry Schmidy, W. H. Nye, and Thomas Argue, parties who claim to have some interest in the property described in plaintiff's complaint, and that unless the said parties are brought in as parties to this action the title of said property cannot be made clear, and the property will not sell for its reasonable value on that

account, and asks that they be brought in and be compelled to exhibit their interest in this action.

(Signed) A. J. DAGGS.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, Defendant. } Motion for Judgement.

Comes the defendant A. J. Daggs and moves the court for judgement upon his counter-claims in this action.

I.

Because the counter-claims are confessed by the plaintiff.

II.

89 Because there is no reply to defendant's counter-claims.

A. J. DAGGS, *Pro Se.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
R. E. DAGGS & A. J. DAGGS, Defendant-. } No. 2554.

Reporter's Transcript of Evidence.

Trial in the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa, before his honor A. C. Baker, judge; tried to the court on the 12th day of October, A. D. 1896, at the court-house, in the city of Phœnix, said county and Territory.

Appearances: Messrs. L. H. Chalmers & Eugene S. Ives, for plaintiff; A. J. Daggs & R. E. Daggs, in person, for defendant-.

90 *Index.*

Witnesses on the part of plaintiff.	Direct ex.	Cross-ex.	Recalled.
F. S. Belcher	Page 4.	Waived.	
Witnesses on the part of defendant-.	**Direct ex.**	**Cross-ex.**	**Recalled.**
R. E. Daggs	Page 7.	Waived.	
A. J. Daggs	Page 24.	Waived.	

Exhibits.

Plaintiff's	Filed Jan. 8th, 1898.
Defendants'	Edwin S. Gill, clerk.

CHAS. H. HOLMES,
Court Reporter, Third Judicial District, Territory of Arizona.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
R. E. DAGGS & A. J. DAGGS, Defendants.

91 Tried by the court without the intervention of a jury on October 12th, 1896, before his honor A. C. Baker, judge of said court, at Phœnix, A. T.

Appearances: L. H. Chalmers, Esq., and Eugene S. Ives, attorneys for plaintiff; R. E. Daggs, Esq., in person, & A. J. Daggs, attorneys for defendants.

An action by plaintiff against the defendants A. J. Daggs and R. E. Daggs to secure the payment of certain promissory notes given by defendant- to plaintiff, secured by mortgage on defendants' property in the town of Tempe, Maricopa county, A. T.

Proceedings Phonographically Reported by Chas. H. Holmes, Court Reporter.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, Plaintiff,
vs.
R. E. DAGGS & A. J. DAGGS, Defendant-. } No. 2554.

92 Be it remembered that on the 12th day of October, A. D. 1896, that being an adjourned session of the May term of said court and a regular judicial day of the said court in and for said county and Territory aforesaid then holden, the within-entitled cause coming on regularly for trial before the court, sitting without the interruption of a jury, parties to this cause being present in open court and represented by their respective counsel, Messrs. L. H. Chalmers and Eugene S. Ives, attorneys for plaintiffs, and A. J. Daggs, Esq., and R. E. Daggs, Esq., appearing for the defendants personally, to maintain by them the issues joined, the said cause proceeded to trial upon the pleadings and proof, and the respective parties offered in evidence the testimony and documentary evidence as hereinafter fully set out in this transcript of proceedings, the same being reduced from the court reporter's shorthand notes taken upon the trial of the said cause.

That upon the introduction of said testimony and documentary evidence the following objections were then and there interposed by counsel for the respective parties, rulings by the court made and exceptions to said rulings taken and noted at the times and in the manner as hereinafter fully set forth in this transcript of evidence, which is as follows, to wit:

Testimony for Plaintiff.

By the COURT: Are you ready in this case of The Phœnix National Bank against R. E. and A. J. Daggs?

By Mr. CHALMERS: Plaintiffs are ready.

By Mr. A. J. DAGGS: The defendants are ready, your honor.

By the COURT: Very well, you may proceed.

93 Mr. A. J. Daggs presents the defendants' plea in abatement. Same overruled by the court. Defendants except.

Mr. Daggs presented demurrer; which was then and there overruled by the court; to which rulings defendants then and there excepted.

Defendants ask leave of the court to file their amended answer; which is allowed by the court.

By Mr. CHALMERS: Does the court allow them to file an amended answer in all three cases?

By the COURT: Yes; the courts are very liberal in that respect.

Counsel for plaintiff excepts to the ruling of the court.

By Mr. CHALMERS: We wish your honor would make an order of the court allowing Mr. Ives' name to be added as counsel in this case for the plaintiff.

By the COURT: Very well, Mr. Clerk, you may make the order.

F. S. BELCHER, Esq., a witness duly called and sworn according to law, was examined on behalf of the plaintiff and testified as follows, to wit:

Examination by Mr. CHALMERS:

By Mr. DAGGS: One moment. Has the court examined the answer in this case?

By the COURT: Let me see the pleadings in this case and the amendment. (The court, perusing the same, remarks, You may proceed.)

By Mr. CHALMERS: What is your name?

A. F. S. Belcher.

94 By Mr. A. J. DAGGS: The surety sets up his right as surety. I suppose Mr. Chalmers will admit that he is simply a surety. I suppose we ought to try that first.

By Mr. CHALMERS: No, sir.

By Mr. DAGGS: We are asking to prove that fact—that he is a mere surety.

By Mr. CHALMERS (addressing witness): Are you the president of the National Bank of Phœnix?

A. Yes, sir.

Q. And it is doing business in Phœnix, Arizona, under a charter?

A. Yes, sir.

Q. Is this the charter of that institution?

A. Yes.

Q. Is this the certificate?

A. It is.

Q. By Mr. CHALMERS: I will introduce that in evidence, but ask leave to withdraw it and file a certified copy of it.

The same was duly admitted without objection and marked "Plaintiff's Exhibit A."

Q. You may examine these notes and see if they are the property of the Phœnix national bank.

A. Yes, sir; they are.

Q. Please state the amounts of money due on each of the notes at the present time, principal and interest.

A. The computation is there. No. 2223 and interest
95 figures to $7,225.16—principal, $6,000 00, and interest. No. 2324 is for $2,500 and interest, which equals $3.010.48; and 2325 is $1,241.73—with interest amounts to $1,495.30.

Q. The total amount, then, is how much?

A. $11,730.94.

(Plaintiff introduces these notes in evidence and asks permission to withdraw them on filing certified copies, which was granted by the court, the same being duly admitted without objection and marked B, C, and D, and the list computing the interest in figures on the same marked Exhibit E.)

Q. State whether any of the interest or any part of these notes has ever been paid.

A. No, sir.

Q. And they are now due and wholly unpaid?

A. Yes, sir.

(We will offer this mortgage in evidence. Defendant objects to the introduction of the mortgage on the ground that it has been mutilated after it has been signed. Objection overruled, and defendants except. Same was duly admitted and marked "Plaintiff's Exhibit F.")

Q. This mortgage was given to secure the payment of these three promissory notes, was it not?

A. Yes, sir.

Plaintiffs rest.

Cross-examination:

By Mr. A. J. DAGGS: Who was present at the Phœnix national bank on the 28th day of November, 1894?

A. I have no means of knowing, but I understand that Mr. Fleming was.

96 Q. Mr. James A. Fleming?

A. Yes, sir.

Q. He was the acting qualified president of the bank at that time?

A. I think he was. I came in in February, 1895.

That is all.

Witness excused.

Defense.

R. E. DAGGS, a witness called on behalf of the defense, was duly sworn according to law, examined upon his corporal oath, and testified as follows, to wit:

Examined by Mr. A. J. DAGGS:

Q. Did you sign any of these notes mentioned and introduced in evidence here?

A. No, sir.

Plaintiffs objection to the question as immaterial, for the notes speak for themselves. Objection overruled, and plaintiffs except.

By Mr. DAGGS: What relation do you bear to these contracts?

Plaintiffs object to the question as involving a conclusion of law, the court remarking, "They speak for themselves. The objection is sustained."

Q. Are you security in any manner upon these notes?

(Plaintiffs object to the question. Objection sustained.)

—. Our contention is that R. E. Daggs gave a mortgage to secure the payment of these notes, and signed as security.

97 By the COURT: I have sustained the objection. (Defendants except.)

By Mr. DAGGS: Did you give a mortgage to secure these notes?

A. Yes, sir.

Q. Then you are simply a surety?

(Plaintiffs object to the question. Objection sustained. Defendants except.)

Q. Did you get any of the benefits from this mortgage or notes?

(Plaintiffs object. Objections sustained, and defendants except.)

Q. How did you come to give a mortgage to secure the payment of these notes?

(Plaintiffs object to the question as immaterial.)

By the COURT: You may state your object in asking that question.

By Mr. DAGGS: I have alleged that he is merely a surety, and I am trying to secure his rights as a surety, and that is the reason I am trying to prove that part of my answer.

By the COURT: I don't think the written instrument can be contradicted.

By Mr. DAGGS: I am simply trying to explain why the written instrument was given.

(Plaintiff objects, and the objection is sustained.)

By Mr. DAGGS: Their bill don't show whether he is a surety or what he is, and I think I am entitled to show that under the pleadings.

By the COURT (reading from exhibit): "I promise to pay."

98 By Mr. DAGGS: Yes, and that is all the relation that he bears to that contract; he received no part of the consideration only in that way.

By the COURT:

Q. I don't think he is permitted to do it.

(Defendants except to the ruling of the court.)

By Mr. DAGGS:

Q. Were you present when these notes were given?

(Plaintiffs object to the question. Objection overruled, and plaintiff excepts.)

A. Yes, sir.

By the COURT: Have you plead failure of consideration?
By Mr. DAGGS: Yes, sir.
By the COURT: Where is it?
A. I have set it up in the counter-claim.

By the WITNESS:

A. Yes; I was there, present when it was signed.
By Mr. A. J. DAGGS: I have plead a contract in regard to that note, and I have set up the contract.
By the COURT: Then I will sustain the objection.
(Defendants except to the ruling of the court.)

By Mr. DAGGS: Do you know anything about a contract being made with the president of the Phœnix national bank relative to these notes?
A. Yes, sir; I do.
Q. State what it was.

(Plaintiffs object to that.) If they have any written contract, let them put it in evidence.

99 By the COURT: Was this contract in writing?
A. Yes, sir.
Q. Was there a written contract?
A. Yes, sir.

By Mr. DAGGS:

Q. I will ask you to examine this contract and see if this isn't the contract.
A. Yes; that is the contract.
Q. When was that made?
A. That was entered into when it was signed.

(Plaintiffs object to the form of question.) The question was asked to examine it and see if that is the contract, and we object to the question and to the answer for the present.
(Objection overruled. Plaintiffs except.)

By Mr. IVES: It doesn't appear that R. E. Daggs is a party to this contract at all.

By the COURT: He has not offered this instrument yet at all. Your objections are premature.

By Mr. DAGGS: I will ask leave to introduce this contract as evidence, and have the privilege to withdraw it and file a certified copy of it.

By Mr. IVES: Plaintiffs don't object to it for the present, but we may move to strike it out after a while, but it may, perhaps, save time to let it go in.

(Same duly admitted in evidence and marked Defendants' Exhibit 1.)

By Mr. DAGGS: I will ask you if you know the signature of James A. Fleming (exhibiting instrument in writing) and if that is it.

A. That is supposed to be the signature of the Phœnix
100 national bank, by James A. Fleming, president.

Plaintiffs don't dispute the signature of the bank.

By Mr. DAGGS:

Q. You may state the agreement between you and Mr. Fleming with regard to the selection of the note specified in this contract.

(Plaintiffs object to the question, as the agreement speaks for itself.)

Attorney DAGGS (reading from an instrument in writing): "It is further agreed that the aforesaid cause of action described shall be continued in the name of the Phœnix national bank until after said cause is determined and settled; and it is further agreed that from this date, Nov. 1st, 1894, A. J. Daggs shall pay the costs that shall hereafter accrue in the said cause."

There was an agreement between Mr. Fleming, acting for the bank, and this surety, with regard to that case that was then pending, and that goes to affect him as a surety, and his signature was signed upon that agreement, and I am asking him about that agreement.

By the COURT: Isn't this the same agreement?

By Mr. DAGGS: No, sir; only a portion of it. He went security on the face of it.

Q. You may state what you know about that agreement.

(Plaintiffs object to the question. Objection sustained. Defendants except to the ruling.)

Q. How did you come to go on security for these notes?

(Plaintiffs object to the question. Objection is sustained.)
101 The COURT (remarking): The notes show that he is a principal, and I will allow no parol testimony to change the terms or tenor of that note, and I ruled that he is, so far as this is concerned, a principal. As a matter of law he is principal on this note—there is no surety about it.

(Defendants except to the ruling of the court.)

Q. Was there any agreement entered into by you—one moment—I think this mortgage shows that he is the surety, and the plaintiff pleads it.

By the COURT: Very well.

By Mr. DAGGS: The mortgage shows that on its face. "For and in consideration of one dollar, and as the security for three promissory notes of A. J. Daggs herein."

By the COURT: That is the ordinary form and term used in drawing a mortgage, is it not?

By Mr. DAGGS: "Said R. E. Daggs, in order to secure the payment, did so and so."

By the COURT: That is no distinction of a surety from a principal on a note.

By Mr. DAGGS: He alleges that he is a mere surety, and he mortgaged his property for the payment of that note.

(The court sustains the objection, and defendants except to the ruling.)

By the COURT (remarking): This is not the method to be taken to control matters of that kind. Section 2410: "When any suit is brought against two or more defendants upon any contract
102 any one or more of the defendants being surety for the others, the surety may, upon a written statement of the matter being set out in his answer, cause the question of suretyship to be tried and determined upon the issue made for the parties defendant at the trial of the cause at any time before the trial but such proceedings shall not delay the suit of the plaintiff."

By Mr. DAGGS: I have alleged that, and now I ask that he is entitled to be tried.

By Mr. IVES: I think my learned friend mistakes the meaning of the statute. This is entirely for the advantages of the principal or surety. The succeeding section demonstrates that: that in case a judgement shall be obtained—it is found that an apparent principal is really a surety—that the sheriff be directed to satisfy the execution first as against the principal; that the payment of these notes authorizing a contract by express agreement; that if these notes are not paid, then to sell the property.

By the COURT: The section has no application here at all. It has no place for a suretyship in this case at all.

By Mr. DAGGS: If a man goes surety for another, he has a right to show that the security has entirely failed.

(Objection sustained by the court, and defendants except to the ruling.)

By Mr. DAGGS: I will ask you if you knew of the assignment of a certain promissory note by the Phœnix national bank by its president to A. J. Daggs.

(Plaintiffs object to the question.)

By Mr. DAGGS: The assignment is plead, and we plead this
103 note as a counter-claim.

A. That furnished a part of the consideration for these three notes, and I never got anything at all.

By the COURT: Is that the note set up here?

By Mr. DAGGS: No, sir; that is the three notes that the three notes were given for—that note the Phœnix national bank held at the time I gave the three notes—and the three notes were exchanged for that note right there.

By Mr. CHALMERS: That note and other notes.

By Mr. IVES: Is that the note that the assignment covered?

A. Yes, sir.

Q. Then, the written assignment speaks for itself?

By Mr. DAGGS: That note is a non-negotiable promissory note and was executed by W. A. and P. P. Daggs to Thos. Armstrong, Jr., and by him given to the Phœnix national bank, and the notes that I gave were given for that note, and the consideration of these three promissory notes was that note.

By Mr. CHALMERS: Anything else?

A. I am talking about that particular note at this time, and I want to say that they are liable to me as an endorser upon it.

By the COURT: Your theory, then, is that the consideration for these three notes that you received is this note (exhibiting instrument)?

A. Yes; and I set it up as a counter-claim. They counted that note on to me and assigned it to me, and now I want it counted
104 off from me the same as it was counted on to me.

By the COURT: Is this the same amount that is expressed in those three notes?

A. Yes, sir.

By Mr. IVES: How about the last question?

Witness answers yes.

Q. How about my objection? Whatever he knows about the assignment is immaterial, for the written assignment speaks for itself.

(Objection overruled for the present.)

By Mr. DAGGS: Reporter, please repeat the last question.

Witness answers yes.

Q. State what you know about that transaction.

By the COURT: Is the assignment in writing?

A. Yes.

By Mr. DAGGS: I will ask you to look at that note and see if that is the note which was assigned by the Phœnix national bank to A. J. Daggs as a part of the consideration for those three promissory notes.

A. Yes, sir; that is the same note.

(Defendants ask to introduce this note in evidence. Same was duly admitted, without objection, and was marked Defendants' Exhibit 2.)

By Mr. DAGGS: Was that note a part of the consideration of the three promissory notes?

A. Yes; that was a part of the consideration.

Q. Was that note counted fully, principal and interest,
105 into these notes at that time?

(Plaintiffs object to the question as being entirely argumentative.)

By the COURT: You may prove the consideration of any instrument.

By Mr. DAGGS: I simply want to make it a little more plain and show that the note and interest were counted in, but I will withdraw the question.

Q. Do you know what property was pledged, further than this, to secure these promissory notes?

(Plaintiffs object to the question.)

By the COURT: Hasn't the mortgage got a description of the property in it?

By Mr. DAGGS: No, sir; there was three given and they have only introduced one that describes the property of the principal.

A. There is water stocks, worth over $4,000, in the Tempe canal, and that was pledged, and they have refused to account to us in any manner for them and refused us any dominion over them, and there is four stocks of water in the Tempe canal worth $1,500.00, and I wanted to show, as a counter-claim and as a conversion, that they had converted these stocks of water, and I want it counted against them.

By Mr. IVES: A creditor can pursue whatever security he may have. There is an answer here, and under the answer of A. J. Daggs it is to the effect that we have converted these water rights.

We are ready to deposit these with the clerk, and after our
106 notes are paid and satisfied they may be delivered, if not satisfactory—that they may be returned to us. We make this offer in order to do away with the allegation of conversion. We have a perfect right to pursue any course we please, but we are perfectly willing to deposit them with the clerk of the court, and in case this property satisfies our notes they will be returned to the parties.

By Mr. DAGGS: These notes are all due, and these people exercise such a dominion over this property that we say it amounts to a conversion, and we think we are entitled to have it credited upon these notes in the first instance, and to——

By Mr. IVES: We are simply holding them until these notes which are in default are paid; that is all.

By the COURT: I will overrule the objection.

(Exception noted.)

By Mr. DAGGS: Do you know of some water stocks being deposited with the Phœnix national bank for the security of these promissory notes?

A. Yes, sir.

Q. State what you know about them.

A. One was in the Tempe canal, and there was one and ½ in the South branch of the Tempe, and one and ½ in the Western branch of the Tempe canal; I don't remember the numbers of the certificates.

Q. What's the value of a share in the Tempe canal?

(Plaintiffs object to the question as incompetent. The question is taken subject to the objection.)

Q. Are you acquainted with the value of water shares in
107 the Tempe canal?

A. Yes, sir; I think I am.

Q. What would be a reasonable value for one whole share of water in the Tempe canal?

(Plaintiffs object to the question on the same grounds as above, and he is not qualified as an expert to answer. Same taken, subject to the objection.)

Q. Do you know what the value of the water stocks are in the main ditch of the Tempe canal?

A. Yes, sir.

Q. Do you know the value of them?

A. I do.

Q. Do you own any of them?

A. I did at one time.

Q. And you knew of their being transferred and sold?

A. Yes, sir.

Q. From your own knowledge of water stocks in the Tempe canal, state what would be the value at the present time of one whole share in the Tempe canal for water.

A. From $2,300 to $2,500.

Q. Are you acquainted with the branches of the Tempe canal?

A. Yes.

Q. And you know the value of water stocks there?

A. Yes; I think so.

Q. Have you owned any of them and know of their selling?

A. Yes.

108 Q. What would be a reasonable — of a share and a half of water in the Southern branch of the canal?

A. About $500.00 per share in that branch. They are not water rights in that branch, but they are rights of way.

Q. What would be the value, if you know, of a share and a half of water in the Western branch of the Tempe canal?

A. About the same thing—$500 or $750 for a share and a half.

Q. What do you know about the value of water in the Utah main ditch—the water shares?

A. I know of them.

Q. Have you owned them and know of their selling?

A. Yes, sir; I have known of a good many selling.

Q. State the reasonable value of a water share in the Utah ditch, if you know.

A. $300; they sometimes sell for more than that, but that is a reasonable value—$300.

Q. What would be a reasonable value of those four shares that were pledged to the Phœnix national bank as security for these notes?

A. $1,200.

Q. Have you made any demand for these stocks or do you know whether any demand was ever made on the Phœnix national bank for them?

(Plaintiffs object to the question. Same was taken under objection by the court.)

109 A. I don't know whether you would call it a demand or not, but prior to the meeting of the canal — last October, 1895, I called on the Phœnix National Bank people and wanted to get a certificate showing that they held these stocks as collateral security for these notes, and presented a written instrument to that effect, showing that they held the notes as collateral, but they refused to sign the instrument or to recognise any rights over the stock whatever.

By Mr. CHALMERS: State just what they did; we object to any voluntary statements.

By Mr. IVES: State what was said to you; not your conclusion from him.

By Mr. DAGGS: Go on and make your statement.

A. I stated the proposition to be what we wanted was a certificate, and also presented it to Mr. Belcher, the president of the bank, and he gave me the certificate with regard to the Utah stock, but he refused to give me a certificate with regard to the Tempe stock and he refused to give me any satisfaction whatever about it.

Q. Do you know anything about the payment by A. J. Daggs of forty-five dollars and some cents, as requested by the Phœnix national bank, for a transcript fee?

A. Yes.

Q. You may state what you know about that transaction.

A. I know that A. J. Daggs paid forty-five dollars ($45) on a transcript fee, costs that they should pay, and I also heard Mr. Fleming say that he would repay it.

Q. I will ask you to look at that and see if you recognize that as the receipt from the agent of the bank.

110 A. Yes, sir.

By Mr. IVES: The defendant A. J. Daggs sets up in his answer that he has expended $45.60 on the transcript and $500 costs in this suit, which was to be transacted in the name of the Phœnix national bank. Now, I contend that he is not entitled to this amount upon any theory except upon a breach of the contract in evidence, and before he can give any testimony he should show some evidence of his breach of the contract, so I would ask that this be entirely suspended as absolutely irrelevant.

By the COURT: Perhaps the best way is to let the matter go in

subject to the objection as in an equity proceeding. Secondly, it will allow a more rapid way of rendering in the testimony, and the judge will exclude in his mind all improper evidence and render a judgement upon the proper evidence.

(Plaintiffs object to this entire list of testimony.)

By the COURT: Very well, it is taken subject to your objection.

Q. Do you know anything about an agreement between the Phœnix national bank and A. J. Daggs in relation to the carrying on of a certain suit in which The Phœnix National Bank — plaintiff and Hugh McCrum was defendant?

(Plaintiffs object to the question, as that agreement is in writing. Objection sustained by the court.)

Q. Do you know whether that broke a breach in the contract in failing to sign the bond?

111 (Plaintiffs object to that, and the objection is sustained.)

Q. Do you know whether the Phœnix national bank ever agreed to have the suit carried on in its name?

(Plaintiffs object to the form of question.)

Q. Did the Phœnix national bank refuse to allow the suit to go on?

(Plaintiffs object to the question.)

Q. You may state, if you know, what occurred with relation to the refusal of the Phœnix nation- bank to allow the suit to proceed in their name.

A. I know that they refused to sign the bond on appeal in the case in which this case appears.

Q. Do you know that the bond was tendered to them for their signature?

A. I do; and they refused to sign it as principal. I saw the bond tendered to Mr. Belcher myself.

Q. Did they refuse to allow its name to — used in the appeal?

(Plaintiffs object to the question as leading. Objection sustained.)

Q. State what you did with relation to that contract, if you know.

A. The bond was presented to Mr. Belcher and he refused to sign it, and then he presented it to their attorney, or rather he said that he would present it to their attorney and let me know, stating that he didn't know but very little about the case, and that he didn't know whether he had to sign the bond or not.

112

Two days after that, on the street over here, I heard Mr. A. J. Daggs ask him if he was ready yet to sign that bond, and he said that he hadn't yet got any instructions from his attorney, and he then called on his attorney, Mr. Chalmers, and he would then let us know in time to allow us to amend our answer. He finally said

that he didn't think they were under any obligations to sign the bond; but if he saw the bank was going to lose anything by not signing the bond he would probably advise them to sign it. Three or four days after that we again called on Mr. Belcher, and he stated that the bank was under no obligations to sign the bond, and that we might rely upon that.

(Defendants ask leave to introduce this receipt in evidence, being for the amount of $15 fee paid. Plaintiffs object, but the same is taken subject to the objection and marked Defendants' Exhibit 3.)

That is all.

By COUNSEL FOR DEFENDANT-: One more question. You may state, Mr. Daggs, the agreement which you signed upon which you mortgaged your property as security for A. J. Daggs.

(Plaintiffs object to the question.)

By the COURT: What is the purpose of this?

By Mr. DAGGS: The defendants offer to show by this witness that he gave a mortgage on his property to secure the payment of these three promissory notes upon the express agreement
113 with James A. Fleming, president of the Phœnix national bank, that the litigation over the $5,000 promissory note assigned to A. J. Daggs should be carried on in the name of the Phœnix national bank and pressed to judgement and settlement, and when this money obtained in that litigation was obtained, that it should go to liquidate and satisfy the three promissory notes sued on, for which he gave his mortgage to secure.

(Plaintiffs object to the question. Objection sustained. Defendants except.)

The COURT (remarking): My theory is that the defendant is principal. Of course, in some circumstances, some courts have held, very lately, that you might prove this agreement, but the majority of the recent decisions hold and the tendency of the courts is to do away with these matters, and I believe that the better plan is to allow nothing to defeat a man's simple obligation in writing like this, and that is the reason for my ruling.

By Mr. DAGGS: The defendants offer further to prove that if the note was not collected that it should be returned and the full amount of it turned and credit given on the 3 promissory notes, and that R. E. Daggs should not be held liable for any more than the difference between the $5,000 note and interest and the three promissory notes sued on.

(Plaintiffs object to the offer to prove. The objection sustained, and the defendants except.)

Witness excused.

114 A. J. DAGGS, a witness duly called and sworn on behalf of the defendant-, testified on his own behalf as follows, to wit:

At the time of the execution of these three notes sued on and as a part of the consideration of the three notes, the Phœnix national

bank assigned to me this $5,000 note that I have set up here as a counter-claim and calculated it in.

(Plaintiffs object to the testimony—particularly after the word "calculated.")

By the COURT: I will exclude everything but regular testimony.

By Mr. IVES: We don't think this testimony starting with these words is pertinent. We don't know how your honor will pass upon this testimony, and we therefore are not prepared, as we might be, with testimony contradicting it, and we are unwilling to open this question up unless we know whether it is competent testimony or not; we don't admit that it is testimony. We are not prepared to disprove them unless it is necessary to disprove them, and therefore in the proper trial of our case we insist upon competent testimony only to be admitted.

By the COURT: Go along, and I will see if it is material.

By Mr. IVES: I will ask that the attorney for the defendant be required to give his testimony in the form of question and answer, to enable us to object to the questions.

WITNESS (continuing): As a part of the $9,700 note it was
115 calculated at one and ¼ per cent. on to me and put in, and at that time it amounted to about $5,200 to $5,400. The note was in litigation at that time and I gave the three notes in payment for the $5,000 note, and gave the notes in payment for their right in the cause of action then pending.

In relation to the $5,000 note, that suit was to be carried on in their name until it was brought to a final determination and settled and the money collected upon it. At that time the money collected upon it should be, of course, received by the Phœnix national bank, and that would liquidate not only the $5,000 note, but they would owe me upon the note and that would also liquidate whatever the face of it was—in the $9,000 note.

I went on with that litigation as far as I could—they were to pay the expenses prior to the 1st of November, when the contract was made, and I paid $46 and costs accrueing on the transcript that came up from the lower court, and they have refused to pay me. I prepared the appeal and I filed it in the supreme court of the Territory and paid all the costs there, amounting to about five hundred dollars ($500 in money) for the brief and printing of the bills of exceptions, statement of facts, and clerk fees, and I put in my own time and followed it in their own name. The case was decided*ly* adversely to the Phœnix national bank, and then I took an appeal to the supreme court and went to Prescott and attended to having the certificate of Judge Rouse in allowing the appeal. I then pre-
pared the bond in appeal, and when I took the appeal—that
116 was August the 2nd, 1895—I immediately prepared to complete the appeal within the time allowed, and have tendered them the bond and they have refused to sign it or to allow their name to be used as principal on the bond, or to allow their name to be used in the appeal to the Supreme Court of the United States. Therefore I proposed to abandon it on that ground.

This five-thousand-dollar note was assigned to me by a separate piece of paper, and the understanding was, as I stated it, that I was to follow it, and I followed it as far as I could. These four certificates of water stocks in the Utah are worth $1,200. There was one whole share in the Tempe worth about $2,500, and those in the branches worth about $1,500.

By R. E. DAGGS:

Q. When they refused to execute the bond did they refuse also to give you credit for the $5,000?

A. Yes, sir.

Q. Did they ever give you any credit on account of it?

A. They have never given me any credit, but have ignored me altogether.

By Mr. CHALMERS: Did you ask that they give you credit for the $5,000?

A. Yes.

Q. Who did you ask?

A. I talked to Mr. Belcher about it.

Q. To anybody else?

A. And also to Mr. Chalmers, and all that I have had a chance to—yes; with Mr. Fleming, for another.

117 WITNESS (continuing): The $4,000 water stocks was pledged as security to this same note, and we have tried to exercise our rights under the canal and they have refused to allow us to do so or to give us anything to show that they were ever held as collateral security, and they have not attempted to foreclose them, and I think they are worth $4,000—the three shares in the extension—and the one whole share ought to be worth $2,500. I have made enquiry, and I know that this is about the price that they are sold for.

These notes that I introduce here in evidence that was first executed by W. A. and P. P. Daggs to Thomas Armstrong, Jr.—that is a non-negotiable note under the terms on its face. It was assigned to the bank when these three notes *was* given, and they sold that to me. That is the same note that I am pleading here in my answer. They seemed to refuse to recognize me any more as soon as the gentlemen obtained the mortgages securing these notes, and I have went on in good faith so far as I could and spent my money and worked as fast as I could to carry out my agreements.

By Mr. R. E. DAGGS:

Q. You have performed all of the conditions upon your part?

A. Yes, sir; as far as I could go, and I got up the bond and the securities for the appeal.

Q. Do you know anything about the financial condition of W. A. and P. P. Daggs at the time this was signed?

A. I knew at that time, and the Phœnix national bank knew that they were insolvent; I knew it, and they knew it at that time.

118 By the COURT: And then you, knowing that fact, bought the note of insolvent parties and gave a good note for it?

A. I knew that they guaranteed the note to me is the reason I took it.

By R. E. DAGGS: Did you buy it on the faith of the statements of the bank?

A. Yes, sir. I would take a note at any time on the Phœnix national bank.

Q. I will ask you if that note was secured by the chattel mortgage which was then in litigation.

A. Yes, sir; there was a chattel mortgage securing the $5,000 note, and if the suit could be prosecuted and final judgement obtained on the amount of property included in the mortgage there would be no trouble about the property satisfying the note. There was plenty of property in the mortgage, and the suit could be finally prosecuted until it could have been satisfied out of the mortgaged property, but they fell down on it.

By Mr. A. J. DAGGS: I will now ask to introduce in evidence the paper allowing the appeal to the Supreme Court of the United States. I will ask to have it identified as Defendants' Exhibit 4.

By Mr. IVES: We are objecting to all of this.

(The objection is sustained.)

By Mr. DAGGS: We will now ask to introduce in evidence the bond that they have refused to sign, and marked Defendants' Exhibit No. 5 (same being duly admitted without objection).

119 By Mr. DAGGS: Again, I believe the interest charged here is more than that allowed under the authority of their charter of the United States statutes.

The COURT (remarking): That is a matter for the United States.

Defendants ask leave to introduce a copy of the statute on that point. The note shows on the face of it.

(Counsel for defendants perusing the statute.)

By Mr. CHALMERS: While they are waiting I would like to introduce some certificates of taxes paid. There is a tax certificate, one for $1,303, and the other for $23.66, tax receipts.

(Defendants object to the introduction of the same on the ground that they have not plead it and on the ground that the mortgagor shall not be liable for anything except the plain face of the mortgage.)

By Mr. CHALMERS: We didn't pay them at the time the complaint was filed, but we will ask to amend the complaint in that particular when it is time for the judgement to issue.

By Mr. DAGGS: I have always been ready and willing to pay the difference between the $5,000 note and interest and the notes in controversy and to deposit the amount, less the amount accrued on the note in the suit and as attorneys' fee and the $45 for the transcript.

By the COURT: Is that all?

By Mr. DAGGS: I believe that is all for the present.

The defendants rest.

120 *Rebuttal.*

By Mr. IVES, counsel for plaintiff: Mr. A. J. Daggs sets up that answer by way of a counter-claim. That is no defense unless upon a breach of contract upon the part of the Phœnix national bank. On no theory can this include the note which A. J. Daggs prosecuted to the supreme court of the Territory except upon a breach of contract. The only contract they made is the assignment where the language reads: "And it is further agreed that the aforesaid cause of action shall be continued under the name of the Phœnix national bank until the said cause is determined and settled; but it is further agreed from this date, November 1st, A. J. Daggs shall pay the costs, if any shall accrue, in said cause."

If there be anything that constitutes a defense, it must emanate from the breach of that contract, and is embraced in those four lines.

By the COURT: On that question of the breach of contract, that don't interfere with my mind at all. If you have any evidence to introduce upon the question of the notes, I would like to hear it.

By Mr. IVES: They sue upon the counter-claim, maintaining that we guaranteed it—that is the language—and Mr. Daggs in his testimony—now, we are not on it. The Phœnix national bank is not an endorser upon that note of A. J. Daggs. Now, he has testified that we have guaranteed it. I want to ask if you- honor will permit any testimony upon that point. We have objected to their testimony and ought to have time to meet it.

121 By the COURT: The testimony is in, subject to your objection, which, upon determining, I will strike out the bad from the good.

By Mr. IVES: Plaintiff moves to strike out all the testimony of the witness A. J. Daggs for the reason of its incompetency; it is also immaterial; and on the further ground of fraud.

I will make this suggestion, that we rest our case on this point, and then if your honor should decide this parol testimony is admissible, then that we shall be permitted to bring in testimony in rebuttal.

By the COURT: You may rest your case, if you wish to do so, but I cannot make any proviso.

By Mr. DAGGS: In regard to the assignment of a non-negotiable note, I will call your honor's attention to section 125, under the assignment they are liable to me.

By the COURT: I will hold that the testimony is admissible.

By Mr. CHALMERS: I would like to dispute that, and say that there is no word of truth in it, and I want time to get Mr. Fleming here to testify to these affairs; he also knows about it.

By the COURT: If the case is submitted, it will be passed on in the morning. I will pass on this case in the morning.

Case closed.

Court thereupon adjourned.

122 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, Plaintiff,
vs.
R. E. DAGGS & A. J. DAGGS, Defendants.

TERRITORY OF ARIZONA,
County of Maricopa, } *ss*:

I, Chas. H. Holmes, court reporter of the third judicial district of the Territory of Arizona, do hereby certify that I was in attendance at the trial of the above-entitled cause in the district court of the county of Maricopa, Territory of Arizona, on the 12th day of October, 1896; that I was the duly appointed and acting court reporter of said court on said day and am now; that as such court reporter, by agreement of the parties to this cause and under the direction of the court at the trial, I reported, phonographically, the proceedings and all of the oral evidence adduced in said cause on said day, and filed the documentary evidence offered on the trial of said cause with the clerk of said court as evidence in said cause.

That I have this day transcribed all of my said shorthand notes of the evidence and proceedings taken upon the trial of said cause, including the objections of counsel, the rulings by the court,
123 and the exceptions to said rulings in the manner and at the times as therein taken and noted; and I hereby certify the foregoing thirty-one pages of typewritten matter to contain a full, true, correct, and complete statement of the said proceedings and all of the oral evidence offered and admitted in said cause, and that no other evidence was therein introduced.

In testimony whereof I, as such court reporter, hereby set my official hand on the 4th day of January, A. D. 1898.

CHAS. H. HOLMES,
Official Court Reporter, Third Judicial District of the Territory of Arizona.

Done at Phœnix, A. T.

PLAINTIFF'S EXHIBIT A, OCTOBER 12TH, 1896.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *April 20th*, 1892.

Whereas, by satisfactory evidence presented to the undersigned, it has been made to appear that "the Phœnix national bank," in the city of Phœnix, in the county of Maricopa and Territory of Arizona, has complied with all the provisions of the statutes of the United States required to be complied with before any asso-
124 ciation shall be authorized to commence the business of banking:

Now, therefore, I, Edward S. Lacey, Comptroller of the Currency, do hereby certify that "the Phœnix national bank," in the city of Phœnix, in the county of Maricopa and Territory of Arizona,

is authorized to commence the business of banking, as provided in section fifty-one hundred and sixty-nine of the Revised Statutes of the United States.

In testimony whereof witness my hand and seal of office this 20th day of April, 1892.

E. S. LACEY,
Comptroller of the Currency.

{ Currency Bureau Seal of the Comptroller of the Currency, Treasury Department. }

140*a*. No. 4729.

Endorsed: Pl'ff's Exhibit A. No. 2554.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, J. E. Walker, clerk of the district court of the third judicial district of the Territory of Arizona in and for Maricopa county, hereby certify that I have compared the foregoing copy with the original Pl'ff's Exhibit A, in case No. 2554, filed in my office Oct. 12th, 1896, and that the same is a true copy of the original and of the whole thereof.

Witness my hand and seal of said court this 27th day of October, A. D. 1896.

J. E. WALKER, *Clerk.*

125 PLAINTIFF'S EXHIBIT B. No. 2554.

PHŒNIX, ARIZONA, *Nov. 1st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay to the Phœnix national bank or order the sum of six thousand dollars in U. S. gold coin, with interest thereon in like gold coin, at the rate of ten per cent. per annum, from date until paid; interest payable annually; all payable at Phœnix, in Maricopa county, Arizona; and in case suit is brought hereon, I further agree to pay two per cent. on the amount found due hereon as attorneys' fees.

$6,000.00. A. J. DAGGS.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, J. E. Walker, clerk of the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa, do hereby certify that I have compared the foregoing copy with the original Plaintiff's Exhibit B, filed in case No. 2554, October 12th, 1896, as appears of record in my office, and that the same is a true copy of the original and of the whole thereof.

Witness my hand and seal of said court this 27th day of October, A. D. 1896.

J. E. WALKER, *Clerk.*

126 PLAINTIFF'S EXHIBIT C. Case No. 2554.

PHŒNIX, ARIZONA, *Nov.* 1*st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay to the Phœnix national bank or order the sum of twenty-five hundred dollars in U. S. gold coin, with interest thereon in like gold coin, at the rate of ten per cent. per annum, from date until paid; interest payable annually; all payable at Phœnix, in Maricopa county, Arizona; and in case suit is brought on this note, I agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$2,500.00.

A. J. DAGGS.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, J. E. Walker, clerk of the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa, hereby certify that I have compared the foregoing copy with the original Plaintiff's Exhibit C in case No. 2554, filed in my office on the 12th day of October, 1896, and that the same is a true copy of the original and of the whole thereof.

Witness my hand and seal of said court this 27th day of October, A. D. 1896.

J. E. WALKER, *Clerk.*

PLAINTIFF'S EXHIBIT D. Case No. 2554.

PHŒNIX, ARIZONA, *Nov.* 1*st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay to the Phœnix national bank or order the sum of twelve hundred and forty-one dollars & $\frac{73}{100}$ in U. S. gold
127 coin, with interest thereon in like gold coin, at the rate of ten per cent. per annum, from date until paid; interest payable annually; all payable at Phœnix, in Maricopa county, Arizona; and in case suit is brought on this note, I agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$1,241.73.

A. J. DAGGS.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, J. E. Walker, clerk of the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa, do hereby certify that I have compared the foregoing copy with the original Plaintiff's Exhibit D in case No. 2554, filed in my office on the 12th day of October, A. D. 1896, and that the same is a true copy of the original and of the whole thereof.

Witness my hand this 27th day of October, A. D. 1896.

J. E. WALKER, *Clerk.*

"PLAINTIFF'S EXHIBIT E."

Frank S. Belcher, president; P. J. Cole, vice-president; C. J. Hall, cashier; A. H. Harscher, 2nd vice-president.

Capital, $100,000.

The Phœnix national bank.

No. 4729.

United States depositary, Phœnix, Arizona.

128 *Computation of Interest on Daggs' Notes from Nov. 1st, 1894, to October 12th, 1896.*

Note # 2323	$6,000.00	
Int., 1 year, 10 %	600.00	
	$6,600.00	
Int., 11 mo. 11 days	625.16	
Am't due Oct. 12, '96	$7,225.16	$7,225.16
Note # 2324	$2,500.00	
Int., 1 year, 10 %	250.00	
	$2,750.00	
Int., 11 mo. 11 days	260.48	
Am't due Oct. 12, '96	$3,010.48	3,010.48
Note # 2322	$1,241.73	
Int., 1 year, 10 %	124.17	
	$1,365.90	
Int., 11 mo. 11 days	129.40	
Am't due Oct. 12, '96	$1,495.30	1,495.30
		$11,730.94

DEFENDANTS' EXHIBIT 1.

Contract.

It is agreed by and between the Phœnix National Bank and A. J. Daggs, all of Phœnix, Maricopa county, Arizona Territory that for and in consideration of the giving of certain promissory notes aggregating in the sum of nine thousand seven hundred and forty-one & $\frac{73}{100}$ dollars ($9,743.73) dated November 1st, 1894, and signed by A. J. Daggs, and secured by mortgage of date November 28th, 1894, on real and personal property described therein, — have sold assigned, transferred, and set over unto the said A. J. Daggs, all their right, title and interest in and to a certain promissory note

signed by W. A. Daggs and P. P. Daggs, as partners, doing
129 business under the firm, name and style of W. A. & P. P. Daggs and W. A. Daggs and P. P. Daggs as individual*ly*, and for five thousand dollars ($5,000) and secured by first mortgage on 35,000 sheep in Coconino Co., Arizona Territory, and given by aforesaid, W. A. & P. P. Daggs, partners, and W. A. Daggs and P. P. Daggs as individuals to Thos. Armstrong Jr., of Maricopa county, Arizona Territory and endorsed by said Thos. Armstrong Jr. and now owned by the Phœnix National Bank of Phœnix, Arizona Territory, and which said note of $5,000.00 is dated July 1st, 1893, and bears interest at the rate of one per cent. per month payable quarterly, and which said nine thousand seven hundred and forty-one & $\frac{73}{100}$ dollar note is received in full payment for the said five-thousand-dollar note hereinbefore described.

It is agreed that the said five-thousand-dollar note herein described is now in litigation between the Phœnix National Bank of Phœnix, Arizona Territory and Hugh McCrum of San Francisco, California and the assignee, D. A. Abrams as assignee of the Bank of Tempe, of Tempe Arizona Territory to establish and determine the priorities of rights under mortgages between the said litigants hereinbefore mentioned which said cause of action and rights of the Phœnix national bank under its first mortgage in said litigation described is also hereby sold, assigned, transferred and set over unto A. J. Daggs for the above nine thousand seven hundred and forty-one & $\frac{73}{100}$ dollars ($9,741.73).

It is further agreed that the aforesaid cause of action described shall be continued in the name of the Phœnix national bank
130 until the said case is determined and settled; but it is further agreed that from this date, Nov. 1st, 1894, A. J. Daggs shall pay the costs that shall hereafter accrue in the said case.

Dated this 28th day of November, 1894.

THE PHŒNIX NATIONAL BANK,
By JAMES A. FLEMING.
A. J. DAGGS.

(Defendants' Exhibit 1, Oct. 12th, 1896.)

TERRITORY OF ARIZONA, }
County of Maricopa, } ss:

I, J. E. Walker, clerk of the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa, hereby certify that I have compared the foregoing copy with the original Defendants' Exhibit 1, filed in my office on the 12th day of October, A. D. 1896, the same having been introduced as an exhibit in the case of the Phœnix National Bank of Phœnix, Arizona against R. E. Daggs and A. J. Daggs; that the same is a true copy of the original and of the whole thereof.

Witness my hand and seal of said court this 14th day of October, A. D. 1896.

[SEAL.] J. E. WALKER, *Clerk.*

131 DEFENDANTS' EXHIBIT 2.

No. 1340. Due Sept. 1.

$5,000. PHŒNIX, ARIZONA, *July 1st*, 1893.

On the first day of September, 1893, without grace, we or either of us, for value received, promise to pay to Thos. Armstrong, at the Phœnix national bank, at their office in Phœnix, Arizona, five thousand (5,000) dollars in United States gold coin, with interest, at the rate of 1 and ¼ per cent. per month, until paid. In case of legal proceedings hereon we or either of us agree to pay ten per cent. of amount due hereon as attorney fees.

W. A. & P. P. DAGGS.

Secured by chattel mortgage of even date herewith.

W. A. DAGGS.
P. P. DAGGS.

Endorsed: Thos. Armstrong, Jr., Sept. 30th, 1893, interest from July 1st to Oct. 1st, 1893, $187.50. Dec. 30th, 1893, interest from Oct. 1st, '93, to January 1st, 1894, $187.50. April 2nd, 1894, interest from Jan. 1st to Apr. 1st, 1894, $187.50.

"DEFENDANTS' EXHIBIT 3."

Office of the territorial treasurer—P. J. Cole, treasurer.

PHŒNIX, ARIZONA.

Procured of A. J. Daggs forty-five dollars and $\frac{65}{100}$, the same being one-half of the clerk's costs as for bill rendered Dec. 28th,
132 1894, and O K by H. Z. Zuck, attorney for Phœnix national bank.

D. A. ABRAMS, *Assignee.*
P. J. COLE.

Jan'y 23rd, 1895.

DEFENDANTS' EXHIBIT 4.

In the Supreme Court of the Territory of Arizona, July Term, 1895.

HUGH MCCRUM, Plaintiff, Appellee,
vs.
W. A. & P. P. DAGGS, Defendant-; PHŒNIX NATIONAL BANK, Intervenor, Appellant. } Appeal.

The application and prayer for the allowance of an appeal in the above-entitled cause having been made upon notice and application in open court and having been seen and read and considered by the court, and it appearing that this is a proper case for an appeal, the amount in controversy being the sum of $5,500.00, as appears from the application and affidavit therein—

133 It is therefore ordered that the appeal be allowed and granted to the Supreme Court of the United States, and that the cost bond in appeal be and is fixed by this court at one thousand dollars ($1,000.00), and that sixty days be and is given the applicant appellant to file its bond in the sum of one thousand dollars, and that the same be approved by the clerk of this court.

OWEN T. ROUSE, *A. J.*

Aug. 2nd, 1895.

In the Supreme Court of the United States.

HUGH MCCRUM, Plaintiff, Appellee,
vs.
W. A. & P. P. DAGGS, Defendants; THE PHŒNIX National Bank, a Corporation; D. A. Abrams, Assignee of the Bank of Tempe, a Corporation; Preserve Wheeler, Intervenor, Appellants. } Appeal Bond.

Know all men by these presents that we, The Phœnix National Bank, a corporation, as principal, and A. J. Daggs, R. E. Daggs, & J. A. Dines, as sureties, are held and firmly bound unto the said Hugh McCrum, of Los Angeles, California, in the sum of one thousand dollars ($1,000.00), lawful money of the United
134 States, to be paid to the said Hugh McCrum, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators, firmly by these presents.

Sealed with our seals and dated this 26th day of September, 1895.

Whereas the above-named intervenor, The Phœnix National Bank, a corporation, hath prosecuted and appealed to the Supreme Court of the United States to reverse the judgement rendered by
[SEAL.] the supreme court of the Territory of Arizona in a certain action wherein Hugh McCrum was appellee and The Phœnix National Bank, a corporation, was intervenor and appellant:

Now, therefore, the condition of this obligation is such that if the above-named The Phœnix National Bank, a corporation, shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

A. J. DAGGS.
R. E. DAGGS.
J. A. DINES.

Sealed in the presence of—

TERRITORY OF ARIZONA, }
County of Maricopa. }

135 We, R. E. Daggs, J. A. Dines, sureties on the within bond, being duly sworn as each for himself and not one for the other, depose and say that he is worth the amount for which he has become liable on the within bond above all debts, exemptions, and liabilities.

R. E. DAGGS.
[SEAL.] J. A. DINES.

J. A. Dines becomes liable on this bond for $500.

Subscribed and sworn to before me this 26th day of September, 1895.

R. W. BELL,
[SEAL.] *Notary Public.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, Plaintiff, *vs.* A. J. DAGGS, R. E. DAGGS, JAMES C. Goodwin, and Benjamin Goldman, Defendants. } Judgement of Foreclosure and Sale, Being Actions Nos. 2554, 2555, 2556.

The cause of The Phœnix National Bank against A. J. Daggs and R. E. Daggs, being the cause number 2554 in this court, having come on for trial on the 12th day of October, 1896, without a jury, Honorable A. C. Baker, presiding, the plaintiff appearing by L. H. Chalmers, Esq., its attorney, and the defendants appearing
136 by A. J. Daggs, Esq., their attorney, and the plaintiff having introduced testimony to sus*pend* the allegations of its complaint, and the defendants having introduced testimony in opposition thereto, and the cause of The Phœnix National Bank against A. J. Daggs, R. E. Daggs, Benjamin Goldman, and James C. Goodwin, being No. 2555, being at issue as to the defendants A. J. Daggs and R. E. Daggs, and the defendants Goodwin and Goldman having interposed an answer by their attorneys, Fitch & Campbell, and the plaintiff having demurred to the said answer of the defendants Goodwin and Goldman, and the said demurrer having been sustained, and no further pleadings having been filed by the said last-named defendants, and the cause of The Phœnix National Bank against A. J. Daggs, numbered 2556, being also at issue, and a stipulation having been made in open court consolidating said three action-, and further testimony having been introduced, and the court being fully and sufficiently advised in the premises:

Now, upon the pleadings and proceedings in the said three actions, on motion of L. H. Chalmers, Esq., for plaintiff—

It is ordered, adjudged, and decreed that the plaintiff have and recover of defendant A. J. Daggs, for principal, the sum of

nine thousand seven hundred and forty-one dollars and $\frac{73}{100}$, and for interest on the same to date of judgement the sum of one thousand nine hundred and seventy-seven and $\frac{97}{100}$ dollars, and for attorneys' fees the sum of two hundred and thirty-four
137 dollars and $\frac{39}{100}$, and for costs and disbursements the sum of ninety-eight dollars and $\frac{85}{100}$, making in all the sum of twelve thousand and fifty-two dollars and $\frac{94}{100}$; and that the said sum of nine thousand seven hundred and forty-one and $\frac{73}{100}$ dollars bear interest from date hereof at the rate of ten per cent. per annum, and that the said sum of two thousand three hundred and eleven dollars and $\frac{21}{100}$ bear interest from date hereof at the rate of seven per cent. per annum.

It is further ordered, adjudged, and decreed that the mortgage liens of the plaintiff, as set out in the complaints as they existed upon the 28th of November, 1894, upon the following-described land and premises and water rights, be, and they are hereby, foreclosed:

The south one-half of the southeast one-quarter of section fifteen (15), township one (1) south, range five (5) east, of the Gila and Salt River base and meridian; also four (4) water rights in the Consolidated Canal Company, represented by certificates numbers 625, 636, 639, and 640; also the northeast quarter ($\frac{1}{4}$) and fifty-three and one-third acres of the northwest quarter of section nineteen (19), township one (1) south, range five (5) east, of the Gila and Salt River base and meridian, the last-mentioned fifty-three (53) acres being further described as follows: Beginning at the northeast corner of said northwest quarter section, running thence 830 feet west along the north line of said section; thence 2,640 feet south to the southern boundary of said quarter; thence 830 feet east along said
138 southern boundary; thence twenty-six hundred and forty feet along the eastern boundary of said quarter section north to the place of beginning, together with all the water rights and shares appurtenant to said lands, all lying within the said county of Maricopa, Territory of Arizona; also all of the north one-half ($\frac{1}{2}$) of the southwest one-quarter ($\frac{1}{4}$) and the south one-half ($\frac{1}{2}$) of the northwest one-quarter ($\frac{1}{4}$) and the northwest one-quarter of the northwest one-quarter ($\frac{1}{4}$) of section ten (10), township one (1) north, range five (5) east, of Gila and Salt River base and meridian, all in the county of Maricopa and Territory of Arizona, with all water rights thereto appurtaining.

The southwest one-quarter ($\frac{1}{4}$) of section twenty-two (22), township one (1) south of range four (4) east, Gila and Salt River base and meridian, containing, according to survey, one hundred and sixty acres, being, lying, and situate in Maricopa county, Territory of Arizona; also the northwest one-quarter ($\frac{1}{4}$) of section thirty-five (35), township one (1) south of range four (4) east, Gila and Salt River base and meridian, being, lying, and situate in the county of Maricopa, Territory of Arizona, and containing, according to survey, one hundred and sixty acres; also the northwest one-quarter of section nineteen (19), in township one (1) south of range five (5) east of the Gila and Salt River base and meridian, except, how-

ever, the following-described portion: Beginning at the northeast corner of said one-quarter (¼) section, thence running west 830 feet along the north line of said one-quarter (¼) section, thence
139 south 2,640 feet to the south line of said quarter section, thence east 830 feet along the south line of said one-quarter (¼) section to the center of said section nineteen (19), thence north along the east line of said one-quarter (¼) section 2,640 feet to place of beginning, and being a strip off the east side of said one-quarter (¼) section, containing fifty-one and $\frac{53}{100}$ acres of land, being, lying, and situate in Maricopa county, Arizona Territory.

Lots number one (1) and two (2) of block number fifty-one (51) of the town of Tempe, Maricopa county, Territory of Arizona, with all the appurtenances thereunto belonging.

It is further ordered, adjudged, and decreed that the clerk of the court issue an order of sale directed to the sheriff of Maricopa county, commanding him to seize and sell the above-described land, premises, and water rights, or so much thereof as may be necessary as under execution, and that after deducting the amount of his fees and expenses of such sale, and all accruing costs and any lien or liens upon said premises so sold at the date of such sale for taxes or assessments, and after paying to the plaintiff, as hereinafter provided, the amount paid by it for or on account of taxes, to apply the proceeds thereof to the judgement and satisfaction of the said sum of twelve thousand and fifty-two dollars and $\frac{94}{100}$, with interest upon the said principal sum of nine thousand seven hundred and forty-one dollars and $\frac{73}{100}$ at the rate of ten per cent. per annum and with interest upon the sum of two thousand three hundred and
140 eleven dollars and $\frac{21}{100}$ at the rate of seven per cent. per annum.

And if the said lands, premises, and water rights shall sell for more than sufficient to pay off said sums of money, then commanding the said sheriff to pay over the excess to the clerk of this court, to the credit of this action, subject to the further order of the court; but if the said lands, premises, and water rights cannot be found, or if the proceeds of such sale shall be insufficient to satisfy said judgement, then commanding the said sheriff to make the money or any balance thereof remaining unpaid out of any other property of the defendant A. J. Daggs, as under ordinary execution.

It is further ordered, adjudged, and decreed that before applying the proceeds of the sale of the lands, premises, and water rights described in the complaint in action No. 2554 to the satisfaction of the amount awarded to the plaintiff the sheriff pay to the plaintiff the sum of thirteen and $\frac{3}{100}$ dollars, with interest from the 8th day of July, 1896, at the rate of seven per cent. per annum, and that before applying the proceeds of the sale of the lands and premises described in the complaint in action No. 2555 to the satisfaction of the amount awarded to the plaintiff the sheriff pay to the plaintiff the sum of one hundred and ten dollars and $\frac{52}{100}$ ($110.52), with interest thereon from the 8th day of July, 1896, at the rate of seven per cent. per annum; which said principal sums were paid by the plaintiff for and on account of taxes.

141 It is further ordered, adjudged, and decreed that the defendants Benjamin Goldman and James C. Goodwin take nothing by reason of their claims herein, and that the defendants and each and every of them, and all persons claiming or to claim from or under them or any or either of them, and all persons having liens subsequent to the mortgages described in the complaints by judgement or decree upon the lands described in the said mortgages, and all persons having any liens by or under such subsequent judgement or decree, and their heirs or personal representatives, and all persons claiming under them, and all persons claiming to have claim of estate or interest in the premises subsequent to the filing of the notice of pendency of any of the three actions herein mentioned be forever barred and foreclosed of all and every equity of redemption or claim in, of, or to the said mortgaged premises and every part and parcel thereof from and after the delivery of the sheriff's deed on the sale thereof.

It is further ordered, adjudged, and decreed that the plaintiff may be a purchaser at the sheriff's sale of said land, premises, and water rights, and that the purchaser or purchasers of said mortgaged premises or water rights at said sheriff's sale be let into possession thereof, and that any of the parties to this action who may be in possession of the said land, premises, or water rights, or any part thereof, or any person who since the commencement of this action has come into possession, or either of them, shall deliver pos-
142 session thereof to said purchaser or purchasers on the production of the sheriff's deed for said land, premises, and water rights, or any part thereof.

Done in open court this 12th day of November, 1896.

A. C. BAKER, *Judge.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, Plaintiff,
vs.
A. J. DAGGS ET AL., Defendants. } Memorandum of Costs and Disbursements.

Numbers 2554, 2555, 2556 heretofore consolidated by order of court, as per stipulation

Disbursements.

Sheriff's fees	$20.40
Clerk's fees	48.45
Witness fees	
Court reporter, $10 per day for three days	30.00
Total	$98.85

143 TERRITORY OF ARIZONA, } ss:
County of Maricopa,

L. H. Chalmers, being duly sworn, deposes and says that he is the attorney for the plaintiff in the above-entitled action, and as

such is better informed relative to the above costs and disbursements than the said defendants; that the items in the above memorandum contained are correct, and that the said disbursements have been necessarily incurred in the said action.

Subscribed and sworn to before me this 13th day of November, 1896.

[SEAL.]

J. E. WALKER, *Clerk*,
By C. H. KNAPP, *Deputy*.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS & R. E. DAGGS, Defendants.

Cases 2454, 2455, 2456 Consolidated. Motion for New Trial.

144 Comes defendants and moves the court to grant them a new trial in this cause for the following reasons:

I.

Because the court erred in not giving judgement in favor of defendant on his plea in bar to the recovery of interest by the plaintiff.

II.

Because the court erred in refusing to sustain the pleas in abatement of the defendant upon the facts of other suits pending on same subject-matter, same being admitted by the plaintiff.

III.

Because the court erred in allowing plaintiff to introduce testimony under the pretended replication of plaintiff to defendant's counter-claims over the objection of the defendant.

IV.

Because the court erred in overruling defendant's motion to compel the plaintiff to bring in Thompson Walker, P. B. Carley, J. H. Guyer, Henry Schmidy, W. Y. Nye, and Thomas Argue, parties who claim an interest in the property mortgaged.

V.

Because the court erred in compelling plaintiff to file a reply to defendant's counter-claims over the objections of the defendant.

VI.

145 Because the court erred in overruling defendant's motion for judgement on the pleadings.

VII.

Because the court erred in allowing the plaintiff to file a supplemental pleadings setting up improper matter for a supplemental bill without notice to the defendant in any manner.

VIII.

Because the court erred in permitting the plaintiff to introduce secondary testimony and to prove the contents of written instruments to be in the possession of the defendants without any notice to defendants to produce the written instruments or demand for inspection and copies.

IX.

Because the court erred in giving judgement on the supplemental bills of the plaintiff without any proof upon the allegations therein contained.

X.

Because the court erred in admitting testimony in favor of the plaintiff upon the counter-claims of the defendants and against the objections of defendant- where there was no issue made by the pleadings thereon.

XI.

Because the court erred in not rendering judgement in favor of the defendant upon the facts admitted by the pleadings.

XII.

Because the court erred in not rendering judgement in favor of the defendant upon his counter-claims and each of —.

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XIII.

Because the court erred in admitting illegal testimony of the plaintiffs over the objection of the defendant.

XIV.

Because the court erred in rejecting legal and competent testimony on part of the defendants.

XV.

Because the trial on defendants' counter-claims was without an issue.

XVI.

Because the judgement is against evidence and the law of the case and against the admitted facts.

XVII.

Because the judgement is void.

XVIII.

Because the court erred in not allowing the surety to test his liability as surety.

XIX.

Because the court erred in holding that defendant R. E. Daggs was a principal.

A. J. DAGGS, *Pro Se.*
R. E. DAGGS, *Pro Se.*

147 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS & R. E. DAGGS, Defendants.

Cases Nos. 2554, 2555, 2556 Consolidated. Bond.

Whereas, in the above numbered and entitled cause, pending in the district court of Maricopa county, and at a regular term of said court, to wit, on the 12th day of November, 1896, the said Phœnix national bank, a corporation, recovered judgement against A. J. Daggs and R. E. Daggs for the sum of $12,052.94 *dollars*, with interest thereon from the 12th day of November, 1896, at ten per cent. and seven per cent. per annum, and all costs of suit; from which judgement the said A. J. Daggs and R. E. Daggs *has* taken an appeal to our supreme court:

Now, therefore, we, A. J. Daggs and R. E. Daggs, as principals, and the London Company, a corporation, as surety, acknowledge ourselves bound to pay the Phœnix national bank, a corporation, the sum of $600.00, conditioned that the said A. J. Daggs and R. E. Daggs, appellants, shall prosecute their appeal with effect and shall pay all costs which have accrued in the court below or which may accrue in the appellate court.

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A. J. DAGGS. [SEAL.]
R. E. DAGGS. [SEAL.]
[SEAL.] THE LONDON COMPANY,
A Corporation, [SEAL.]
By A. J. DAGGS, *President.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the Count- of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, *vs.* A. J. DAGGS & R. E. DAGGS, Defendants. } Nos. 2554, 2555, 2556 Consolidated.

TERRITORY OF ARIZONA, *County of Maricopa,* } *ss:*

A. J. Daggs, being duly sworn, says that he is the duly elected and acting president of the London Company, a corporation, duly organized and existing and doing business under and by virtue of the laws of Arizona, with its principal place of business at Phœnix, Maricopa county, Arizona Territory, and as such
149 officer makes this affidavit for said corporation on its behalf and in its stead; that it has power and authority by its charter to sign bonds and other instruments of indemnity.

That he knows what its assets and liabilities are, and knows of his own knowledge that it is worth the amount for which it has become liable on the above and foregoing instrument over and above its just debts and liabilities, exclusive of property exempt from execution.

[SEAL.]

A. J. DAGGS,
President of the London Company.

Subscribed and sworn to before me this 21st day of April, A. D. 1897.

IDA I. WOODWORTH,
Notary Public.

My commission expires the 20th day of October, 1900.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, *vs.* A. J. DAGGS & R. E. DAGGS, Defendant-. } Nos. 2554, 2555, 2556 Consolidated.

Supersedeas Bond.

Whereas, in the above numbered — entitled cause, pending
150 in the district court of Maricopa county, and at a regular term of said court, to wit, on the 12th day of November, 1896, the said The Phœnix National Bank, a corporation, recovered judgement against the said A. J. Daggs and R. E. Daggs, surety-, for the sum of $12,052.94, with interest thereon from the 12th day of November, 1896, at — per cent. per annum, and all costs of suit; from which judgement the said A. J. Daggs and R. E. Daggs *has* taken

an appeal to our supreme court and desires to suspend the execution of said judgement during the pendency of said appeal:

Now, therefore, we, A. J. Daggs and R. E. Daggs, as principal-, and the London Company, a corporation, as surety, acknowledge ourselves bound to pay the Phœnix national bank, a corporation, the sum of twenty-four thousand seven hundred and five dollars and $\frac{88}{100}$ ($24,705.88), conditioned that the said A. J. Daggs and R. E. Daggs shall prosecute their appeal with effect, and in case the judgement of the appellant court shall be against them *and* they shall perform its judgement, sentence, or decree and pay all such damages as said court may award against them, and shall pay the value of the rent or hire of such property in any suit which may be brought therefor.

Witness our hands this 29th day of April, 1897.

A. J. DAGGS.
R. E. DAGGS.
THE LONDON CO.,
A Corporation.
[SEAL.] By A. J. DAGGS, *President.*

151 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS & R. E. DAGGS, Defendants.

TERRITORY OF ARIZONA,
County of Maricopa, } *ss.:*

A. J. Daggs, being duly sworn, says that he is the duly elected and acting president of the London Company, a corporation duly organized and existing and doing business under and by virtue of the laws of Arizona, with its principal place of business at Phœnix, Maricopa county, Arizona Territory, and as such officer makes this affidavit for said corporation on its behalf and in its stead; that it has power and authority by its charter to sign bonds and other instruments of indemnity; that he knows what its assets and liabilities are, and knows of his own knowledge that it is worth the amount for which it has become liable on the above and foregoing instrument over and above its just debts and liabilities, exclusive of property exempt from execution.

A. J. DAGGS,
President of the London Company, a Corporation.

152 Subscribed and sworn to before me this 29th day of April, A. D. 1897.

[SEAL.] IDA I. WOODWORTH,
Notary Public.

My commission expires the 20th day of October, 1900.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, *vs.* A. J. DAGGS & R. E. DAGGS, Defendants. } Cases Nos. 2554, 2555, and 2556 Consolidated. Notice to Justify.

To A. J. Daggs and R. E. Daggs, defendants in said action:

You are hereby notified that the plaintiff in the above-entitled cause has filed with me a notice that it does not accept the supersedeas bond on the appeal of said case to the supreme court of the Territory filed by you on the 29th day of April, 1897, together with his exception to the surety thereon, and that I have appointed Wednesday, the fifth day of May, at the hour of nine o'clock a. m., before the Hon. A. C. Baker, judge of said court, at the court-
153 house, in the city of Phœnix, Arizona, as the time and place when and where said surety shall appear and justify as to its competency and sufficiency as surety on said bond.

Dated this third day of May, A. D. 1897.

J. E. WALKER,
Clerk of said Court.

OFFICE OF THE SHERIFF, COUNTY OF MARICOPA.

I hereby certify that I received this above notice to justify on the 3rd day of May, 1897, at 9 o'clock a. m., and personally served the same on the 3rd day of May, 1897, on A. J. Daggs and R. E. Daggs, being the defendants named in said notice, by delivering to each of said defendants in the city of Phœnix, county of Maricopa, a true copy of said notice.

Dated May 3rd, 1897.

L. H. ORME, *Sheriff*,
By J. E. BOYD, *Deputy*.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, *vs.* A. J. DAGGS & R. E. DAGGS, Defendants. } Cases Nos. 2554, 2555, 2556 Consolidated.

154 *Notice to Justify.*

To A. J. Daggs and R. E. Daggs, defendants in said action:

You are hereby notified that the plaintiff in the above-entitled cause has filed with me a notice that it does not accept the bond on appeal of said cause to the supreme court of this Territory filed by you on April 21st, 1897, together with his exception to the surety thereon, and that I have appointed Monday, the 26th day of April,

1897, before Hon. A. C. Baker, judge of said court, at his chambers in the court-house, in Phœnix, Arizona, at the hour of ten o'clock a. m., as the time and place when and where said surety shall appear, and justify as to its competency and sufficiency as surety on said bond.

Dated this 23rd day of April, 1897.

J. E. WALKER,
Clerk of said Court.

OFFICE OF THE SHERIFF, COUNTY OF MARICOPA.

I hereby certify that I received the within notice on the 23rd day of April, 1897, at the hour of 12 a. m., and personally served the same on the 23rd day of April, 1897, on A. J. Daggs and R. E. Daggs, being the defendants named in said notice, by delivering to each of said defendants, in the city of Phœnix, Maricopa county, a true copy of said notice.

Dated April 23rd, 1897.

L. H. ORME, *Sheriff*,
By J. E. BOYD, *Deputy*.

155 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, *vs.* A. J. DAGGS & R. E. DAGGS ET AL., Defendants.	Cases Nos. 2554, 2555, 2556 Consolidated. Affidavit of Service.

The plaintiff in the above-entitled cause hereby gives notice that it does not accept the supersedeas bond (so called) filed with the clerk of said court in said action by defendants A. J. Daggs and R. E. Daggs on April 29th, 1897.

That it excepts to the London Company as surety on said bond for the reason that it is not authorized or empowered to become surety on bonds, and for the further reason that the said surety has not filed its affidavit that it is worth the amount of the penalty on said bond.

And for the further reason that the London Company has not complied with the laws of this Territory so as to enable it to become a surety on said bond.

And for the further reason that the said London Company is not worth the amount of the penalty in said bond.

And for the further reason that all of the property of the said London Company consists in a claim to the title of the prop-
156 erty in controversy herein, which claim is subject and inferior to the judgement in this cause.

L. H. CHALMERS,
Att'y for Plaintiff.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

O. H. Lincoln, being first duly sworn, deposes and says that on the 1st day of May, A. D. 1897, between the hours of nine o'clock a. m. and 4 o'clock p. m., he served a copy of the annexed notice upon J. E. Walker, clerk of the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa, and upon R. E. Daggs, at his office, in Phœnix, Maricopa county, Arizona Territory, and left a copy of said notice at the office of A. J. Daggs, R. E. Daggs being present in the office of A. J. Daggs when the A. J. Daggs copy was left in his office.

O. H. LINCOLN.

Subscribed and sworn to before me this 1st day of May, A. D. 1897.

[SEAL.] L. H. CHALMERS,
Notary Public.

My commission expires Feb'y 9th, 1898.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

157 THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, *vs.* A. J. DAGGS, R. E. DAGGS, ET AL., Defendants. } Cases Nos. 2554, 2555, 2556 Consolidated.

To A. J. Daggs, Esq.:

The plaintiff in the above-entitled cause hereby gives notice that it does not accept the supersedeas bond (so called) filed with the clerk of said court in said action by defendants A. J. Daggs and R. E. Daggs on April 29th, 1897.

That it excepts to the London Company as surety on said bond for the reason that it is not authorized or empowered to become surety on bonds, and for further reason that the said surety has not filed its affidavit that it is worth the amount of the penalty on said bond.

And for the further reason that the London Company has not complied with the laws of this Territory so as to enable it to become a surety on said bond.

And for the further reason that the said London Company is not worth the amount of the penalty in said bond.

And for the further reason that all of the property of the said London Company consist- in a claim to the title of the property in controversy herein, which claim is subject and inferior to the judgement in this cause.

L. H. CHALMERS,
Att'y for Plaintiff.

158 & 159 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS & R. E. DAGGS ET AL., Defendants.
} Cases Nos. 2554, 2555, 2556 Consolidated.

To J. E. Walker, clerk of above court:

The plaintiff in the above-entitled cause hereby gives notice that it does not accept the supersedeas bond (so called) filed with the clerk of said court in said action by defendants A. J. Daggs and R. E. Daggs on April 29th, 1897.

That it excepts to the London Company as surety on said bond for the reason that it is not authorized or empowered to become surety on bonds, and for the further reason that the said surety has not filed its affidavit that it is worth the amount of the penalty on said bond.

And for the further reason that the London Company has not complied with the laws of this Territory so as to enable it to become a surety on said bond.

And for the further reason that the said London Company is not worth the amount of the penalty in said bond.

And for the further reason that all of the property of the said London Company consists in a claim to the title of the property in controversy herein, which claim is subject and inferior to the
160 judgement in this cause.

L. H. CHALMERS,
Att'y for Plaintiff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS & R. E. DAGGS ET AL., Defendants.
} Cases Nos. 2554, 2555, 2556 Consolidated.

To R. E. Daggs, Esq.:

The plaintiff in the above-entitled cause hereby gives notice that it does not accept the supersedeas bond (so called) filed with the clerk of said court in said action by defendants A. J. Daggs and R. E. Daggs on April 29th, 1897.

That it excepts to the London Company as surety on said bond for the reason that it is not authorized or empowered to become surety on bonds, and for further reason that the said surety has not filed its affidavit that it is worth the amount of the penalty on said bond.

And for the further reason that the London Company has not

complied with the laws of this Territory so as to enable it to become a surety on said bond.

And for the further reason that the said London Company is not worth the amount of the penalty in said bond.

And for the further reason that all of the property of
161 the said London Company consists in a claim to the title of the property in controversy herein, which claim is subject and inferior to the judgement in this cause.

L. H. CHALMERS,
Att'y for Plaintiff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS & R. E. DAGGS ET AL., Defendants.
} Cases Nos. 2554, 2555, 2556 Consolidated.

The plaintiff in the above-entitled cause hereby gives notice that it does not accept the appeal bond (so called) filed with the clerk of said court in said action by defendants A. J. Daggs and R. E. Daggs on April 21st, 1897.

That it excepts to the London Company as surety on said bond for the reason that it is not authorized or empowered to become surety on bonds, and for the further reason that the said surety has not filed its affidavit that it is worth the amount of the penalty on said bond.

And for the further reason that the London Company has not complied with the laws of this Territory so as to enable it to become a surety on said bond.

162 And for the further reason that the said London Company is not worth the amount of the penalty in said bond.

And for the further reason that all of the property of the London Company consists in a claim to the title of the property in controversy herein, which claim is subject and inferior to the judgement in this cause.

L. H. CHALMERS,
Att'y for Plaintiff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
R. E. DAGGS & A. J. DAGGS, Defendants.
} Motion to Vacate Order.

Comes A. J. Daggs, appearing specially, — moves the court to set aside, vacate, and annul the order of this court of May 5th, 1897, in the above-entitled cause:

I.

Because this court has no jurisdiction to make the said order.

II.

163 Because the time had not expired upon proper notice in which to justify defendants' sureties on a supersedeas bond when said order was made.

III.

Because no notice has beeen given by the proper parties to justify.

IV.

Because the jurisdiction of this cause has been transferred to the supreme court, and this court is without jurisdiction to make any kind of an order or decision herein.

V.

Because said order is without the authority of law and void.

A. J. DAGGS, *Pro Se.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, Defendants in Error, *vs.* A. J. DAGGS & R. E. DAGGS, Defendants, Plaintiffs in Error.	Cases Nos. 2554, 2555, 2556 Consolidated.

Petition in Error.

164 To E. S. Gill, clerk of the district court of the third judicial district of the Territory of Arizona in and for Maricopa county:

I.

Your petitioners state that defendants in error are residents of Maricopa county, Arizona Territory, with the principle place of business at Phœnix, and that they are a corporation duly organized and existing under the laws of the United States of America, and that the plaintiffs in error A. J. Daggs and R. E. Daggs are residents of Phœnix, Maricopa county, Arizona Territory, and that L. H. Chalmers is the attorney of record of the defendants in error, and that said attorney resides at Phœnix, Maricopa county, Arizona Territory.

II.

Your petitioners would further show that in the above court in the above numbered and entitled cause that the above (plaintiff) defendant in error above named, to wit, on the 12th day of Novem-

ber, A. D. 1896, the same being a day of the regular November term of the above court, obtained a judgement for the recovery of defendant A. J. Daggs, one of the plaintiffs in error, — the principal sum of nine thousand seven hundred and forty-one dollars and $\frac{73}{100}$, and for interest on the same to date of judgement the sum of one thousand nine hundred and seventy-seven — and *and* $\frac{97}{100}$, and for attorneys fees the sum of two hundred and thirty-four dollars and $\frac{39}{100}$, and for costs and disbursements the sum of ninety-eight dol-
165 lars and $\frac{85}{100}$, making in all the sum of twelve thousand and fifty-two and $\frac{94}{100}$ dollars, and bearing interest at the rate of ten per cent. per annum on the principal sum and interest upon the interest at the rate of seven per cent. per annum, respectively, against A. J. Daggs, and for the foreclosure of their mortgage lien as it existed upon the 28th day of November, 1894, upon the property in said judgement described against A. J. Daggs and R. E. Daggs, plaintiffs in error.

III.

Your petitioners further allege and show that in the proceedings and during the trial of said cause manifest error hath happened to the great damage and prejudice of your petitioners, and your petitioners desire that said cause be removed to our supreme court for revision and correction.

IV.

Your petitioners therefore pray that a citation issue to the plaintiffs, defendants in error, or their attorney of record, that they have due notice thereof according to law.

A. J. DAGGS, *Pro Se.*
R. E. DAGGS, *Pro Se.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa, November Term, 1897.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, *vs.* R. E. DAGGS & A. J. DAGGS, Defendants.	Cases Nos. 2554, 2555, 2556 Consolidated.

166 Comes now the Phœnix National Bank, by L. H. Chalmers, Esq., its attorney, and announces to the court that it is ready to proceed with the justification of the sureties and the hearing of its exceptions to the appeal bond filed by the defendants herein. R. E. Daggs, secretary of the London Company, one of the sureties on said bond, being present, offering to justify said surety on said bond, the court refused to allow such justification, the court holding that said London Company is not a surety company as contemplated by statute, and cannot by its charter become surety on bonds. The court finds William Billups, one of the sureties on

said bond, sufficient, and orders that Robert Doll, the other surety on said bond, appear and justify.

WEBSTER STREET, *Judge.*

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, Edwin S. Gill, clerk of the district court of the third judicial district of Arizona Territory in and for Maricopa county, hereby certify that I have compared the foregoing copy with the original minute order in the above-entitled action made and entered on the 31st day of December, 1897, and that the same is a true copy of the original and of the whole thereof.

Witness my hand and the seal of said court this 8th day of January, 1898.

[SEAL.]

EDWIN S. GILL, *Clerk,*
By C. H. KNAPP,
Deputy Clerk.

167 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHOENIX NATIONAL BANK, a Corporation, Plaintiff, *vs.* R. E. DAGGS & A. J. DAGGS, Defendants. } No. 2554. Nos. 2554, 2555, and 2556 Consolidated.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, Edwin S. Gill, clerk of the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa, do hereby certify that no justification of the surety Robert Doll, one of the sureties on the appeal bond in the above entitled and numbered causes, consolidated, has been offered by said defendants, nor has said surety, Robert Doll, appeared and justified, as required by order of this court, made in this consolidated cause on the 31st day of December, 1897.

Given under my hand and the seal of said court this 10th day of January, A. D. 189–.

[SEAL.]

EDWIN S. GILL,
Clerk District Court,
By C. H. KNAPP,
Deputy Clerk.

168 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, Defendants in Error,
vs.
A. J. DAGGS & R. E. DAGGS, Defendants, Plaintiffs in Error.

Cases Nos. 2554, 2555, 2556 Consolidated.

Cost Bond.

Whereas, in the above numbered and entitled cause, pending in the district court of Maricopa county, and at a regular term of said court, to wit, on the 12th day of Nov., 1896, the said The Phœnix National Bank, a corporation, recovered judgement against A. J. Daggs and against A. J. Daggs and R. E. Daggs for foreclosure of its mortgage lien for the sum of $12,052.94, with interest thereon from the 12th day of November, 1896, at 10 % and 7 %, resp., per cent. per annum, and all costs of suit; from which judgement the said A. J. Daggs and R. E. Daggs *has* sued out a writ of error to our supreme court:

Now, therefore, we, A. J. Daggs and R. E. Daggs, as principals, and Wm. M. Billups, the London Company, and R. F. Doll, as surety-, acknowledge ourselves bound to pay the Phœnix National Bank, a corporation, the sum of three hundred dollars, conditioned that the said A. J. Daggs, R. E. Daggs, plaintiffs in error, shall prosecute their writ of error with effect and shall pay all
169 costs which have accrued in the court below or which may accrue in the appellate court.

Witness our hands this 12th day of Nov., A. D. 1897.

R. E. DAGGS. [SEAL.]
A. J. DAGGS. [SEAL.]
R. F. DOLL. [SEAL.]
WM. M. BILLUPS. [SEAL.]
THE LONDON COMPANY. [SEAL.]
R. E. DAGGS, *Secretary.*

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Wm. M. Billups, whose name is subscribed to the above undertaking, being duly sworn, says he is a resident and householder of Maricopa county, Arizona Territory, and that he is worth the amount for which he has become liable on said bond over and above all just debts and liabilities, exclusive of property exempt from execution.

WM. M. BILLUPS. [SEAL.]

Subscribed and sworn to before me this 21st day of November, A. D. 1897.

[SEAL.] E. W. WILBUR,
Notary Public.

My commission expires Dec. 20th, 1897.

170 TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

R. F. Doll, surety, whose name is subscribed to the above undertaking, being duly sworn, says he is a resident and householder of Maricopa county, Arizona Territory, and is worth the amount for which he has become liable on said bond over and above all his just debts and liabilities, exclusive of property exempt from execution.

R. F. DOLL. [SEAL.]

Subscribed and sworn to before me this 12th day of November, 1897.

[SEAL.] JOHN P. WILBUR,
Notary Public.

My commission expires the 15th of November, 1900.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

R. E. Daggs, being duly sworn, says he is the secretary of the London Company, a corporation, organized and existing under the laws of Arizona Territory, and makes this affidavit for it on its behalf and in its stead, and knows of his own knowledge that it is worth the amount for which it has become liable, over and above all its just debts and liabilities.

R. E. DAGGS. [SEAL.]

171 I have fixed the probable amount of the costs of the suit of both appellate and the court below at $150.00, and approve the foregoing bond this 12th day of November, A. D. 1897.

[SEAL.] EDWIN S. GILL,
Clerk of the District Court of Maricopa County.

Subscribed and sworn to before me this 12th day of November, A. D. 1897.

JOHN P. WILBUR,
[SEAL.] *Notary Public.*

My commission expires the 15th day of November, 1900.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiffs, Defendants in Error,
vs.
A. J. DAGGS & R. E. DAGGS, Defendants, Plaintiffs in Error.

Summons in Error.

In the name of the Territory of Arizona to The Phœnix National Bank, a corporation, defendants in error; to L. H. Orme, sheriff, or any constable of Maricopa county, Greeting:

You are hereby commanded to summon the Phœnix
172 National Bank, a corporation, residing at Phœnix, Maricopa county, Arizona Territory, with its principal place of business at Phœnix, or L. H. Chalmers, its attorney of record, who resides at Phœnix, Maricopa county, Arizona Territory, if the parties cannot be found, to be and appear before our supreme court at the next regular term thereof, to be held in the city of Phœnix, on the second Monday in January, A. D. 1898, and then and there defend their writ of error granted on petition of A. J. Daggs and R. E. Daggs therein against the above parties as defendants therein and filed in this court on the 12th day of November, A. D. 1897, praying the revision and correction of a certain judgement rendered in cases Nos. 2554, 2555, 2556, consolidated, on November the 12th, A. D. 1896, at the regular May term of the district court of the third judicial district of the Territory of Arizona, wherein the above-named defendants in error as plaintiffs obtained judgement for the recovery of the principal sum of nine thousand seven hundred and forty-one dollars and $\frac{73}{100}$, and interest on the same to date of judgement the sum of one thousand nine hundred and seventy-seven and ninety-seven hundredths dollars, and for attorneys' fees the sum of two hundred and thirty-four dollars and $\frac{39}{100}$, and for costs and disbursements the sum of ninety-eight dollars and $\frac{85}{100}$, making in all the sum of twelve thousand and fifty-two dollars and $\frac{94}{100}$, and bearing interest, at the rate of ten per cent. per annum, on the principal sum and interest upon the interest at the rate of seven per cent. per annum, respectively, against A. J. Daggs, and for the foreclosure of their mortgage lien as it existed on the
173 28th day of November, A. D. 1894, upon the property in said judgement described against A. J. Daggs, R. E. Daggs, plaintiffs in error.

Herein fail not, but of this writ make due return within sixty days of the date hereof, showing how you have executed the same.

Issued this the 12th day of November, A. D. 1897.

Witness E. S. Gill, clerk of the district court of Maricopa county, A. T.

E. S. GILL.

Given under my hand and seal of said court, at my office, in Phœnix, Arizona, this the 12th day of November, A. D. 1897.

[SEAL.] E. S. GILL, *Clerk.*

OFFICE OF THE SHERIFF, COUNTY OF MARICOPA.

I hereby certify that I received the within summons, together with a copy of petition in error, on the 26th day of November, A. D. 1897, at the hour of 1.45 p. m., and personally served the same, together with said copy of petition in error, on the 26th day of November, A. D. 1897, on The Phœnix National Bank, being the (plaintiffs) defendants in error, by delivering to C. J. Hall, cashier of said Phœnix national bank, in the city of Phœnix, county of Maricopa, a copy of said summons, to which was attached a true copy of the complaint mentioned in said summons, together with said petition in error.

174 Dated this 26th day of November, 1897.

L. H. ORME, *Sheriff,*
By H. C. ORME, *Deputy.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, Defendants in Error,
vs.
A. J. DAGGS & R. E. DAGGS, Defendants, Plaintiffs in Error.

Case Nos. 2554, 2555, 2556 Consolidated.

Notice.

To Edwin S. Gill, clerk of the above-entitled court, and A. J. Daggs, the attorney for defendants:

You and each of you will please take notice that the plaintiff, The Phœnix National Bank, does not accept the appeal bond on file herein on date of November 12th, 1897.

The plaintiff's non-acceptance of said bond is based upon the following:

175 I.

The London Company, one of the sureties of said bond, cannot legally become a surety on a bond under the laws of the Territory of Arizona.

II.

The said London Company is insolvent.

III.

All of the signers and sureties on said bond are insolvent.

Dated this 14th day of December, A. D. 1897.

L. H. CHALMERS,
Att'y for Plaintiff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, Defendants in Error,
vs.
R. E. DAGGS & A. J. DAGGS ET AL., Defendants, Plaintiffs in Error.

Cases Nos. 2554, 2555, 2556 Consolidated.

Notice to Justify.

To A. J. Daggs and R. E. Daggs, plaintiffs in error in said action:

You are hereby notified that the defendants in error in the above-entitled cause have filed with me a notice that they do not
176 accept the bond in error in said cause given *given* to secure the probable costs on appeal to the supreme court of this Territory and filed by you on the 12th day of November, A. D. 1897, together with his exception to the surety thereon. In accordance therewith I have appointed Saturday, December 18th, 1897, before the Hon. Webster Street, judge of said court, at the hour of 9.30 a. m. of said day, or as soon thereafter as may be, said court being then in regular session, as the time and place when and where said surety shall appear and justify as to its competency and sufficiency as surety on said bond.

Dated this 15th day of December, A. D. 1897.

[SEAL.] EDWIN S. GILL,
Clerk of said District Court.

OFFICE OF THE SHERIFF, COUNTY OF MARICOPA.

I hereby certify that I received the within notice to justify on the 15th day of December, 1897, and personally served the same on the 15th day of December, 1897, on R. E. Daggs and A. J. Daggs personally, and on the London Company, a corporation, by delivering to R. E. Daggs and A. J. Daggs personally, and on the London Company, a corporation, by delivering to R. E. Daggs, secretary of said London Company, a true copy of this notice in the city of Phœnix, county of Maricopa.

Dated Dec. 15th, 1897.

[SEAL.] L. H. ORME, *Sheriff*,
By J. E. BOYD, *Deputy*.

177 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
R. E. DAGGS & A. J. DAGGS, Defendants.

Case No. 2554.

Be it remembered during the progress of this cause the following orders and minutes were made:

September 23rd, 1896.—Set for trial on Monday, Oct. 12th, 1896.

Oct. 12th, 1896.—The demurrer to the complaint in this cause was overruled by the court and excepted to by defendants. On motion, leave was granted defendants to file amended answers.

Oct. 12th, 1896.—On motion of L. H. Chalmers, Esq., counsel for plaintiff, it is ordered by the court that Eugene S. Ives be added as counsel for plaintiff in this case and in case- number 2555 and number 2556.

Oct. 12th, 1896.—This cause came regularly on for trial by the court, the plaintiff appearing by its counsel, L. H. Chalmers
178 and Eugene S. Ives, Esq., and the defendants appearing in person. The complaint and answer were read by the court. F. S. Belcher was called, sworn, and examined as a witness for the plaintiff and cross-examined by the defendants, and documentary evidence offered by the plaintiff. Plaintiff rests.

R. E. Daggs and A. J. Daggs *was* called, sworn, and examined as witness- in their own behalf and cross-examined by the plaintiff and documentary evidence offered by the defendant-, and pending the introduction of testimony for the defendant- the further trial of this cause — continued until tomorrow morning *until* 9 o'clock.

Oct. 13th, 1896.—On motion of counsel for plaintiff, it was ordered by the court that the further trial of this cause be continued, to be hereafter set by the court; and it is further ordered by the court that the trials of cases number 2555 and number 2556 be continued to follow this case.

Oct. 16th, 1896.—By leave of the court first being had, plaintiff filed his supplemental complaint in this cause.

Oct. 19th, 1896.—Ordered that this case be set for trial on Monday, October 26th, 1896.

Oct. 26th, 1896.—The motion for judgement by the de-
179 fendant- came on to be heard by the court, L. H. Chalmers, Eugene S. Ives, Esq., appearing for the plaintiff, and A. J. Daggs, Esq., appearing for the defendant-; said motion was submitted and by the court overruled; to which ruling defendants except. On motion, leave was granted plaintiff thirty minutes to prepare and file answer to counter-claim. The demurrer to the counter-claims was then presented and by the court overruled. Defendants excepts. The motion of defendant- to strike out supplemental complaint was presented and by the court overruled; to which ruling the defendant- excepts. The demurrer to the supplemental complaint was then presented and by the court overruled, and defendant- excepts. R. E. Daggs and A. J. Daggs were then recalled and cross-examined by plaintiff, and L. H. Chalmers was called, sworn, and examined by the plaintiff and cross-examined by the defendant-. The trial of this cause was continued until tomorrow at nine o'clock.

Oct. 27th, 1896.—It is agreed and stipulated in open court and shall become a part and parcel of the minutes of the court in this case by and with the consent of counsel of the respective parties that action- number 2554, number 2555, and number 2556 be, and the same are hereby, consolidated for trial and judgement, and the evidence introduced in the case number 2554 be, and the same shall

be, considered as all the evidence in cases Nos. 2555 and 2556, excepting that the notes, mortgage, and the tax receipts or payment for taxes, as described in cases No. 2555 and 2556, shall also
180 be considered in evidence, and but one judgement shall be rendered in all the cases.

Oct. 27th, 1896.—The trial of this case was resumed, the plaintiff appearing by their counsel, L. H. Chalmers and Eugene S. Ives, Esq., and the defendants appearing in person. A. J. Daggs was recalled and examined by the plaintiff, and F. S. Belcher was called, sworn, and examined by the plaintiff and cross-examined by the defendant-. The evidence being closed, cause was argued to the court by Eugene A. Ives, for the plaintiff, and by A. J. Daggs, Esq., for the defendant-, and submitted on briefs to be filed by both parties within ten days.

Nov. 12th, 1896.—This cause having heretofore been tried, argued, submitted, and by the court taken under advisement, now, on this day, after due consideration of the same, it is ordered by the court that judgement be entered for the plaintiff.

March 20th, 1897.—Cases No. 2554, 2555, and 2556 consolidated. The motion for a new trial in this cause *were* presented and by the court overruled; to which ruling of the court defendants except and gave notice of an appeal from judgement and order denying motion for a new trial to the supreme court of the Territory of Arizona.

June 11th, 1897.—On motion of L. H. Chalmers, Esq.,
181 counsel for plaintiff, and it appearing to the court that the bond on appeal — filed by defendants on April 21st, 1897, and excepted to by plaintiff on April 22nd, 1897, and notice having duly been served on defendants of said exception to the surety on said bond, and they having failed to appear and justify, it is ordered by the court that the said bond be, and is hereby, disapproved.

June 11th, 1897.—On motion of L. H. Chalmers, Esq., counsel for plaintiff, and it appearing to the court that the supersedeas bond on appeal — filed by defendants on April 29th, 1897, and excepted to by plaintiff on May 1st, 1897, and notice having duly been served on defendants of said exception to the surety on said bond, and they having failed to appear and justify, it is ordered by the court that said bonds be, and is hereby, disapproved.

June 18th, 1897.—The motion of defendants filed May 6th, 1897, to vacate order disapproving appeal bond was presented and by the court overruled; to which ruling of the court defendant- excepts and gave notice in open court of an appeal to the supreme court of the Territory of Arizona from the order denying motion to vacate the order disapproving appeal bond.

April 30th, 1897.—Court adjourned *sine die*.

182 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, BENJAMIN GOLDMAN, JAMES C. GOODWIN, & R. E. Daggs, Defendants.
} Case No. 2555

Be it remembered during progress of this cause the following orders and minutes were made:

May 14th, 1896.—On motion, leave was granted defendants to file plea in abatement.

Nov. 14th, 1896.—The demurrer to the amended answer in this cause came on to be heard, L. H. Chalmers appearing for the plaintiff and Fitch & Campbell appearing for Goldman and Goodwin. Said demurrer was argued to the court by plaintiff, and argument on part of the defendants was continued until tomorrow.

May 22nd, 1896.—Plea in abatement in this cause was argued to the court by L. H. Chalmers, Esq., for the plaintiff, and A. J. Daggs for the defendant-, submitted, and by the court taken under
183 advisement by the court.

May 29th, 1896.—The demurrer to the cross-complaint was argued to the court by Joseph Campbell, Esq., for defendants Goldman and Goodwin, submitted, and by the court taken under advisement.

Sept. 23rd, 1896.—Set for trial on Monday, Oct. 12th, 1896.

Oct. 12th, 1896.—The plea in abatement having heretofore been argued and submitted and by the court taken under advisement, now, on this day, after due consideration of the same, it is ordered that said plea in abatement be, and is hereby, overruled; to which ruling of the court defendant- excepts. The demurrer to the complaint in this cause was overruled by the court and excepted to by the defendants.

Oct. 12th, 1896.—The demurrer to the answer of Benjamin Goldman and James C. Goodwin having heretofore been submitted and by the court taken under advisement, now, on this day, it is ordered that said demurrer be sustained.

Oct. 19th, 1896.—Ordered that this cause be set for trial Monday, Oct. 26th, 1896.

184 Oct. 26th, 1896.—On motion, leave was granted plaintiff to file answer to counter-claim.

Nov. 12th, 1896.—This cause having heretofore been tried, argued, and submitted and by the court taken under advisement, now, on this day, after due consideration of the same, it is ordered by the court that judgement be entered for the plaintiff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, *vs.* A. J. DAGGS, Defendant. } Case No. 2556.

Be it remembered during progress of this cause the following orders and minutes were made:

May 14th, 1896.—On motion, leave was granted defendant to file the plea in abatement.

May 22nd, 1896.—The plea in abatement in this cause was
185 argued by L. H. Chalmers, counsel for the plaintiff, and A. J. Daggs, for himself, submitted, and by the court taken under advisement.

Sept. 23rd, 1896.—Set for trial on Monday, Oct. 12th, 1896.

Oct. 12th, 1896.—The plea in abatement in this cause having heretofore been argued and submitted and by the court taken under advisement, now, on this day, after due consideration of the same, it is ordered by the court that said plea in abatement be, and is hereby, overruled; to which ruling of the court defendant excepts. The demurrer to the complaint in this cause was overruled by the court and excepted to by defendant.

Oct. 16th, 1896.—By leave of the court first being had, plaintiff filed his supplemental complaint in this cause.

Oct. 19th, 1896.—Ordered that this cause be set for trial Monday, Oct. 26th, 1896.

Oct. 26th, 1896.—On motion, leave was granted plaintiff to file answer to counter-claim.

Nov. 12th, 1896.—This cause having heretofore been tried,
186 argued, and submitted, and by the court taken under advisement, now, on this day, after due consideration of the same, it is ordered by the court that judgement be entered for the plaintiff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiffs, *vs.* A. J. DAGGS ET AL., Defendants. } Cases Nos. 2554, 2555, 2556 Consolidated.

Be it remembered that during the progress of this cause the following orders and minutes were made:

Dec. 18th, 1897.—By consent of the parties hereto, the matter of the justification of sureties on the appeal bond herein be continued to the next law day of this court.

Dec. 31st, 1897.—Comes now the Phœnix National Bank, by L. H. Chalmers, Esq., its attorney, and announces to the court that it is ready to proceed with the justification of the sureties and the

hearing of the exception to the appeal bond filed by the
187 defendant herein. R. E. Daggs, secretary to the London Company, one of the sureties on said bond, being present, offering to justify said surety on said bond, the court refused to allow such justification, the court holding that said London Company is not a surety company as contemplated by statute and cannot by its charter become surety on bonds. The court finds William Billups, one of the sureties on said bond, sufficient, and orders that Robert Doll, the other surety on said bond, appear and justify.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS & R. E. DAGGS, Defendants. } Case No. 2554.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, BENJAMIN GOLDMAN, JAMES C. GOODWIN, and R. E. Daggs, Defendants. } Case No. 2555.

188 THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS, Defendant. } Case No. 2556.

I, Edwin S. Gill, clerk of the above-entitled court, do hereby certify that the above and foregoing record papers of above-entitled court in above numbered and entitled causes contains all the original papers on file in my office before and after the consolidation of said causes, including all exhibits offered at the trial of said consolidated causes, with a full and complete transcript of all orders and minute entries appearing on the record of the above-entitled court in above numbered and entitled causes before and after consolidation, including the order adjourning the Nov. term, 1896, of said court, made according to rule three of our supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of the said district court this 10th day of January, A. D. 1898.

EDWIN S. GILL,
Clerk of the Dist. Court of the Third Jud. Dist. of the Ter. of Arizona, Maricopa County.

Filed the above the 10th day of January, A. D. 1898.

189 In the Supreme Court of the Territory of Arizona.

THE PHŒNIX NATIONAL BANK, Plaintiff, Defendant in Error,
vs.
R. E. DAGGS, Defendant, Plaintiff in Error.

Defendant's Motion to Dismiss.

Filed January 11th, 1898.

Comes now the plaintiff and defendant in error in the above-entitled cause, and by its attorney, L. H. Chalmers, Esq., moves the court to dismiss the above-entitled cause from the calender of this court for the following reasons:

I.

That the bond on file in this case does not comply with the law of the Territory of Arizona regarding bonds in error to the supreme court.

II.

Because the defendant and plaintiff in error herein has lost the right to sue out a writ of error for the reason that he elected between remedies of appealing or sueing out a writ of error, and, having failed to perfect his appeal, is not entitled to a writ of error in this court.

III.

190 For the reason that there is no bill of exceptions or statements of facts filed in this cause.

IV.

That the statement of record filed herein does not comply with the law.

L. H. CHALMERS,
Attorney for the Defendant in Error.

In the Supreme Court of the Territory of Arizona.

R. E. DAGGS ET AL., Plaintiff- in Error,
vs.
THE PHŒNIX NATIONAL BANK, a Corporation, Defendant in Error.

Minute Entry of January 12th, 1898.

On motion of Mr. A. J. Daggs, counsel for plaintiff in error, it is ordered that plaintiff in error have three days from this date in which to file answer to defendant in error's motion to dismiss the writ of error herein. On motion of counsel for plaintiff in error, it is further ordered that the hearing of this cause be set for February 4th, 1898; briefs of plaintiff- in error to be filed by January 24th, 1898, and briefs of defendant in error by January 29th, 1898.

191 In the Supreme Court of the Territory of Arizona.

R. E. DAGGS ET AL., Plaintiff- in Error,
vs.
PHŒNIX NATIONAL BANK, Defendant in Error.
} Minute Entry of January 19th, 1898.

The motion of defendant in error to dismiss appeal, filed herein, having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that said motion be, and the same is hereby, denied.

On motion of Mr. L. H. Chalmers, counsel for defendant in error, it is ordered that defendant in error have until January 29th to file brief, and cause ordered set for hearing on February 4th, 1898.

In the Supreme Court of the Territory of Arizona.

R. E. DAGGS & A. J. DAGGS, Plaintiffs in Error,
vs.
THE PHŒNIX NATIONAL BANK, a Corporation, Defendant in Error.
} Motion and Suggestion of Diminution of the Record. Filed January 20th, 1898.

192 Come plaintiffs in error and suggest to the court that the record on file in this case in this court is incomplete, in this: That there *is* missing from the record on file herein the following papers:

The amended answer of A. J. Daggs, which was duly filed in the court below on Oct. 12th, 1896, in case No. 2554.

Also "Exhibit F," being a real-estate mortgage; also Exhibit C. H. H., notice to produce certain papers.

Also Exhibits G, H, I, J, K, L, L, being purported tax certificates and receipts for money paid on taxes.

Also the testimony, offered in rebuttal by plaintiff (and taken by the court reporter at the trial), of F. S. Belcher, L. H. Chalmers, and cross-examination of A. J. Daggs.

In pursuance to the above suggestion, plaintiff in error moves this court for an order on the clerk of the district court of Maricopa county, Arizona, that he certify to this court the papers designated by the above suggestion.

A. J. DAGGS,
Att'y for Pl'ff in Error.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

R. E. Daggs, being duly sworn, says that he was at the trial of the above-entitled cause in the district court and is familiar with the record and papers on file therein and knows of his own knowledge that the exhibits above described were introduced in
193 evidence at the trial of said cause, and also that the amended answer above described was duly filed in said cause, and all

of said exhibits and papers should be a part of the record in this cause; that the evidence above designated was given on the trial of said cause and should be a part of this record.

That he examined the record on file in this court on the 18th day of January, 1898, and found that it contained none of the papers or exhibits or testimony designated above; that the testimony that is now on file is certified to by the court reporter as being all the testimony taken in the trial of this case, but the same is in fact only about one-half of the said testimony; that he has ordered the court reporter to make out the rest of the testimony and file the same; which is being done.

R. E. DAGGS.

Subscribed and sworn to before me this the 19th day of January, A. D. 1898.

[SEAL.] IDA I. WOODWORTH,
Notary Public.

My commission expires Oct. 21st, 1900.

In the Supreme Court of the Territory of Arizona.

R. E. DAGGS ET AL., Plaintiff- in Error,
vs.
PHŒNIX NATIONAL BANK, a Corporation, Defendant in Error.
} Minute Entry of January 24th, 1898.

194 Comes now A. J. Daggs, Esq., counsel for plaintiff in error, and suggesting to the court diminution of the record in this cause, it is ordered that the clerk of the court below be, and hereby is, directed to certify to this court the papers and testimony, as follows:

The amended answer of A. J. Daggs, which was duly filed in the court below on October 12th, 1896, in case No. 2554; also Exhibit "F," being a real-estate mortgage; also Exhibit C. H. H.—notice to produce certain papers; also Exhibit- G, H, I, J, K, L, L, being purported tax certificates and receipts for money paid on taxes; also the testimony offered in rebuttal by plaintiff and taken by the court reporter at the trial; and it is further ordered that defendant in error have until January 29th, 1898, to file brief.

In the Supreme Court of the Territory of Arizona.

R. E. DAGGS ET AL., Plaintiff- in Error,
vs.
THE PHŒNIX NATIONAL BANK, a Corporation, Defendant in Error.
} Minute Entry of February 4th, 1898.

This cause coming on for hearing was argued by A. J. Daggs, attorney for plaintiff- in error, and by Mr. L. H. Chalmers, for defendant in error, and the cause ordered submitted. On motion of
195 counsel for appellee, ordered that they have until 10th of February to file brief, and, on motion of counsel for appellant, they were granted three days thereafter to file reply brief.

In the Supreme Court of the Territory of Arizona.

R. E. DAGGS & A. J. DAGGS, Appellants & Plaintiffs in Error,
vs.
THE PHŒNIX NATIONAL BANK, Appellees and Defendants in Error.

Affidavit of Defendant in Error.

Filed February 7th, 1898.

In accordance with the announcement made at the argument of this cause on the 4th day of January, 1898, with the permission of the court then and there had, now comes L. H. Chalmers, Esq., attorney for the defendant in error herein, and moves the court that it allow and permit him to file the paper referred to in his evidence in the court below at folio 54 in the supplemental statement of record in this court.

This motion is based upon the affidavit hereunto attached.

L. H. CHALMERS,
Att'y for Def't in Error.

196 In the Supreme Court of the Territory of Arizona.

R. E. DAGGS & A. J. DAGGS, Appellants and Plaintiffs in Error,
vs.
THE PHŒNIX NATIONAL BANK, Appellees and Defendants in Error.

TERRITORY OF ARIZONA,
County of Maricopa, } *ss:*

L. H. Chalmers, being first duly sworn, deposes and says:

That he is one of the attorneys in the above-entitled action; that in the trial of the case in the court below he represented the plaintiff in that court and was also a witness on behalf of the plaintiff; that he has examined the supplemental statement of record on file in this court and found, as he examined such statement from folios 46 to 60 of such supplemental statement, that such folios contained a statement of the matter and things that took place in the court below during a portion of the time that your deponent was on the witness stand in the court below.

That the Exhibit C. H. H. mentioned in said statement of record was a notice to produce testimony, said notice being served in the court below by the plaintiff upon the attorney for the defendant; that among other things sought to be obtained by said notice
197 was a certain assignment or bill of sale made by the Phœnix national bank to A. J. Daggs, a copy of which assignment or bill of sale is hereto annexed and marked Exhibit "A;" that the paper referred to at the bottom of folio 52 of said statement of record as being admitted in evidence over the objection of defendant was the original Exhibit "A" on file herein; that said Exhibit "A" *A*

was handed to the court reporter in the court below, and that he, through a mistake, put it in his notes as being Exhibit C. H. H., which had been previously admitted in evidence, and that after the trial of said case said Exhibit "A" was placed by the reporter of this court among other exhibits filed in said cause, but it was not marked for identification; that your deponent, when he discovered that said exhibit was not in the record of the case in this court, examined the envelope containing the exhibits which had been filed in the court below and found said Exhibit "A" among said exhibits; that said exhibit is material to the issues of said cause, and that it would be prejudicial to the defendant in error should said cause be submitted to this court without the original paper introduced in the court below being placed in evidence.

L. H. CHALMERS.

Subscribed and sworn to before me this 5th day of February, 1898.

[SEAL.] JENNIE C. WILLIS,
Notary Public.

My commission expires January 22nd, 1902.

198 Phœnix national bank.

Deposited by Bank Tempe.

Overdraft Account.

PHŒNIX, ARIZONA.

Items on outside points credited subject to payment.

From Nov. 25 to Nov. 27th, 1894.

Gold	
Silver	
Currency	
Checks	
Am	$4,318.92
At 1 % per month	
Due	263.45
	$4,582.37

See that all checks and drafts are endorsed.

Amended to L. H. Chalmers' affidavit.

EXHIBIT "A."

For and in consideration of the giving of three promissory notes of date Nov. 1st, 1894, secured by three mortgages of date Nov. 28, 1894, as full payment by A. J. Daggs to the Phœnix national bank, it hereby sells and assigns to A. J. Daggs the annexed overdraft, together with all its right, title, and interest in and to the col-
199 lateral security given to secure this overdraft, and said notes of A. J. Daggs are taken as full payment of said overdraft

and for said collaterals, the assignment being made without recourse on the said Phœnix national bank, which said collaterals are as follows:

Two (2) notes of date Jan. 1st, 1893, for four hundred dollars ($400.00), each signed Harry Z. Zuck and due respectively Jan. 1st, 1895, and Jan. 1st, 1896.

Two (2) notes of date July 5th, 1893, signed Robert Boxen and W. A. Daggs, each due ninety days after date.

Three (3) notes of date March 10th, 1894, signed A. J. Daggs, one for five thousand dollars ($5,000.00), due one year from date; one for seven thousand dollars ($7,000.00), due two years from date; one for three thousand dollars ($3,000.00), due eighteen months from date, together with a mortgage to secure the last three notes above mentioned, which said mortgage dated March 10th, 1894, is recorded in Book 18 of Mortgages, pages 108, 109, records of Maricopa county.

All of which said overdraft and collaterals are sold and assigned without recourse on the said Phœnix national bank.

Dated this 28th day of November, 1894.

(Signed) THE PHŒNIX NATIONAL BANK,
By JAMES A. FLEMING, *President.*

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

200 Eugene S. Ives, being first duly sworn, deposes and says:

That he was one of the attorneys for the plaintiff, The Phœnix National Bank, in the court below; that he examined the witness L. H. Chalmers in the trial in this case in the court below; that he has read the foregoing affidavit of L. H. Chalmers and examined the exhibit thereto attached; that the said exhibit was introduced in evidence in the court below and is the paper referred to at the bottom of folio 52 as being admitted in evidence.

EUGENE S. IVES.

Subscribed and sworn to before me this 5th day of February, 1898.

[SEAL.]

JENNIE C. WILLIS,
Notary Public.

My commission expires January 22nd, 1902.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

A. C. Baker, being first duly sworn, deposes and says:

That he was the presiding judge at the trial of the case of The Phœnix National Bank against A. J. Daggs and R. E. Daggs *et al.*; that he has examined the foregoing affidavit of L. H. Chalmers and the supplemental statement of record in this cause in this court, especially that portion of the supplemental statement of record em-

braced between folios 46 and 60 of the said supplemental
201 statement; that "Exhibit A" in the affidavit of L. H. Chalmers is a copy of the paper which was admitted in evidence, as described at the bottom of folio 52 of the said supplemental statement, and that the reporter in the court below in referring to such paper by mistake referred to it as being the same heretofore identified as Exhibit C. H. H.

A. C. BAKER.

Subscribed and sworn to before me this 7th day of February, 1898.

JENNIE C. WILLIS,
[SEAL.] *Notary Public.*

My commission expires Jan. 22nd, 1902.

In the Supreme Court of the Territory of Arizona.

R. E. DAGGS & A. J. DAGGS, Appellants and Plaintiffs in Error, vs. THE PHŒNIX NATIONAL BANK, Appellees and Defendants in Error.	Affidavit of Court Reporter. Filed Feb'y 8th, 1898.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Chas. H. Holmes, being first duly sworn, deposes and says:

That he was the official court reporter who reported this
202 case in the court below; that since transcribing his notes of said case for the plaintiffs in error he has gone carefully over them; that he has carefully examined that portion of his notes from which the supplemental statement, which is on file in this court, was taken; that the paper referred to at the bottom of folio 52 of said supplemental statement of record was and is identical with Exhibit "A," attached to the affidavit of L. H. Chalmers, Esq., filed in this court on February 7th, 1898.

Your affiant further states that through a mistake in the order of which the exhibits were handed to him, without examining carefully, he marked one exhibit twice and failed to mark the paper described by L. H. Chalmers in his affidavit as Exhibit "A" to his affidavit.

Affiant further states that said paper was introduced in evidence in said cause.

CHAS. H. HOLMES.

Subscribed and sworn to before me this 8th day of February, 1898.

JENNIE C. WILLIS,
[SEAL.] *Notary Public.*

My commission expires Jan. 22nd, 1902.

In the Supreme Court of the Territory of Arizona, January Term, 1898.

R. E. DAGGS & A. J. DAGGS, Plaintiffs in Error,
vs.
THE PHŒNIX NATIONAL BANK, a Corporation, Defendants in Error.

Affidavit of Plaintiff in Error. Filed February 8th, 1898.

203

TERRITORY OF ARIZONA, *County of Maricopa*, } ss:

R. E. Daggs, being first duly sworn, says:

I was at the trial of the cause and heard L. H. Chalmers testify and cross-examined him. I saw the paper in controversy referred to between folio- 48 and 49, supplemental abstract. I saw L. H. Chalmers produce what purported to be a copy of the original. I heard Chalmers make the offer to introduce it. I heard A. J. Daggs object to it because it was a copy and that the original was the best evidence. I am positive the paper referred to as a copy between folios 48 and 49, supplemental abstract, was not out of the hands of Chalmers. I heard the court, A. C. Baker, ask A. J. Daggs if he had the original. I heard him say he had. I heard Baker ask to see the original. I saw A. J. Daggs produce the original and hand it to A. C. Baker, the judge. I saw the judge examine it, as the record shows at folio- 49 to 50, supplemental abstract. I saw the court, after examination, hand the original paper back to A. J. Daggs. The original paper was then handed by A. J. Daggs to me. I asked Mr. Chalmers some questions about it and handed it back to A. J. Daggs, who placed it in an envelope and returned it to his pocket. This original bill of sale was never offered in evidence nor handed to the reporter or to the plaintiff's counsel. The

204 purported copy was never out of the hands of Mr. Chalmers and was never in the hands of the reporter. The paper marked C. H. H. was a notice to produce papers, and is the correct paper as marked by the reporter after the case was appealed, and when I made up the record the clerk of the trial court, Mr. Gill, nor myself could not find any of the exhibits. There was no receipt on file for any papers on exhibit. We hunted two days for them, and on the third day I asked Mr. Chalmers if he knew where the exhibits were. He told me he might possible have some of them, to call on him later. I called. He gave me Plaintiff's Exhibits A, B, C, D, E; Defendants' Exhibits 1, 2, 3, 4, and 5, and said that was all he knew anything about. Afterward, when we began on the brief in this case, we found that the record was not complete in due time. I called on Mr. Chalmers again, and informed him that the exhibits were not all there yet. He promised me to look again. I called on him again, and he had the envelope spoken of in his affidavit with several papers in it belonging to the defendant in this case. He gave me Exhibits F, G, H, I, J, and C. H. H. He also in passing over the papers in the envelope passed over the paper purporting to be his Exhibit "A" that he now

wishes to substitute for C. H. H, with the remark, "That is a copy of the bill of sale; it is not one of the exhibits." This was not all of the exhibits, as there was an Exhibit K, L, and L 2. I insisted that he had them all. He said positively that this was all he had; that he knew nothing about any more. I have examined the copy marked Exhibit "A" in his affidavit, and it don't appear to
205 be a true copy.

R. E. DAGGS.

Subscribed and sworn to before me this 8th day of February, 1898.

[SEAL.] JOHN P. WILBUR,
Notary Public.

My commission expires the 15th day of Nov., 1900.

In the Supreme Court of the Territory of Arizona, January Term, 1898.

R. E. DAGGS & A. J. DAGGS, Plaintiffs in Error, *vs.* THE PHŒNIX NATIONAL BANK, a Corporation, Defendants in Error. | Affidavit of *Defendant* in Error A. J. Daggs. Filed February 8, 1898.

TERRITORY OF ARIZONA, *County of Maricopa*, } *ss*:

A. J. Daggs, being duly sworn, says that he represented himself in the court below in the above-entitled cause and is an attorney-at-law, and was present when L. H. Chalmers gave evidence, as appears in the supplemental abstract at folios 43 and continuing to the end of said Chalmers' testimony; that the paper marked Exhibit "A," among the affidavits of L. H. Chalmers, was never handed to the stenographer; that it will be seen by examination of folios 48 and 49 that at the time some paper was offered. The record
206 does not show what paper or kind of paper *that* was offered, but when the paper was offered affiant objected on the ground that the original was the best evidence; whereupon the court said to affiant, "Have you it with you?" and affiant answered, "I have;" whereupon the court said, "Allow me to see it?" Affiant then handed the court the original paper, when the court continued and, holding the original paper in his hand, said, "That calls for three notes—$7,000.00, $4,000.00, and $3,000.00—made by A. J. Daggs to the order of R. E. Daggs," and, speaking to Mr. Chalmers, asked, "Did you see those notes?" To which question Chalmers answered, "Yes, sir; when they were in the possession of the Phœnix national bank the endorsement was on them." Mr. Chalmers retained the paper he had and never handed it to the reporter, and the court handed the original paper to affiant. Mr. Chalmers continued to testify about the *contracts* of the papers and retained his paper purporting to be a copy of the original in his hand, and by following

his testimony to folios 52 it will be gathered that the court offered to allow the exhibit to be introduced, but he kept it in his possession and handed the paper C. H. H. and carried the other paper away with him. When the transcript of the record was necessary to be made in this case all the exhibits were found in the possession of Mr. Chalmers, and, after the motion on part of the defendants in error was made suggesting diminution of the record, Mr. Chalmers sounded affiant to see if plaintiffs in error had copies of all the papers, so that the necessary papers and exhibits might be supplied, and when he found that the papers could be supplied
207 he then said that he had the exhibits, and did turn over to R. E. Daggs the exhibits mentioned in R. E. Daggs' affidavit, and same will be found as the exhibits respectively in the supplemental abstract.

That Mr. Chalmers never discovered it was necessary for him to try to weaken the testimony of appellants on the consideration of these three notes sued on until he received affiant's brief; that his purposes at trial was to get to testify orally about the contents — written instruments, and his purpose now is to attempt by this introduction to cost the inference that this $5,000 note was only a small part of the consideration of the nine-thousand-dollar notes sued on. Affiant further shows that the original paper was in the court at the time and he could have introduced it or read it to the stenographer notes, but that neither was done.

A. J. DAGGS.

Subscribed and sworn to before me this 8th day of February, 1898.

JOHN P. WILBUR,
[SEAL.] *Notary Public.*

My commission expires Nov. 15th, 1900.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
208 A. J. DAGGS ET AL., Defendant-. } Amended Answer. Filed February 9th, 1898.

Should defendants' pleas in abatement and demurrers be by the court overruled, the defendant A. J. Daggs, answering separately by his amended answer, denies each and every allegation in said complaint contained not hereinafter admitted or otherwise pleaded.

I.

This defendant admits the residence of A. J. Daggs.

II.

This defendant admits the execution of the three promissory notes, as alleged, and the execution of the mortgages to secure the same by defendant A. J. Daggs, as alleged.

III.

This defendant admits that the three promissory notes sets forth and sets out that "they shall bear — the rate of ten per cent. per annum from date until paid" upon the amounts in each of said notes expressed.

IV.

This defendant for his first defense and his defense to the interest on said notes alleges that the said notes are tainted with usury, for that there is no rate of interest fixed by law in Arizona Territory or by title XXXVIII, entitled "Interest of Revised Statute," thereof, governing notes and bills or other evidences of debts, except after maturity, and that the interest so set out and charged in the
209 first instance in said notes exceeds that rate of seven dollars per hundred dollars per year and exceeds the rate of seven per cent. per annum, contrary to the form of the statute in such cases made and provided and contrary to the United States banking act and to sections 5197 and 5198 thereof, and the said interest was charged and contracted for on part of the plaintiffs with full knowledge of said sections of said United States banking act, and knowingly in violation of said act, and in defiance of sections 5197 and 5198 thereof. Wherein and whereby and by force of said United States banking act and of sections 5197 and 5198 of said statute the plaintiff forfeited its right to receive, collect, or recover in any manner of or from this defendant the interest on said three promissory notes or the value of the interest thereon.

Wherefore this defendant asks to be relieved and discharged from the payment of any interest on said notes or either of them, and prays judgement accordingly.

V.

This defendant, for another answer and counter-claim to plaintiff's complaint, alleges:

First. That the plaintiff is indebted to this defendant upon a certain promissory note executed by W. A. and P. P. Daggs, as copartners, and by W. A. and P. P. Daggs, as individuals, and delivered to Thos. Armstrong, Jr., and assigned by said Thos. Armstrong, Jr., in blank to the plaintiff, and said note was on the 28th day of November, A. D. 1894, for a valuable consideration in
210 writing, assigned by the plaintiff to this defendant, and at the time of said assignment the makers of said note were and ever since have been and are now notoriously insolvent; all of which plaintiff well knew; which note is in words and figures as follows, to wit, and marked "Exhibit A," and made a part hereof:

No. 1340. Due Sept. 1st.

$5,000.00. PHOENIX, ARIZONA, *July 1st*, 1893.

On the 1st day of September, 1893, without grace, we or either of us, for value received, promise to pay to Thos. Armstrong, Jr., at the Phœnix national bank, at their office in Phœnix, Arizona, five

thousand dollars ($5,000) in United States gold coin, with interest, at the rate of 1 and ¼ per cent. per month, until paid. In case of legal proceedings hereon, we or either of us agree to pay 10 per cent. of amount due hereon as attorneys' fees.

W. A. AND P. P. DAGGS.

Secured by chattel mortgage of even date herewith.

W. A. DAGGS.
P. P. DAGGS.

And endorsed on the back as follows: Thos. Armstrong, Jr. Sept. 30th, 1893, interest from July 1st to Oct. 1st, 1893, $187.50. Dec. 30th, 1893, interest from Oct. 1st, '93, to Jan'y 1st, '94, $187.50. April 2nd, 1894, interest from Jan. 1st to April 1st, $187.50.

Second. And no part of said note has been paid since the said assignment by the plaintiff to this defendant, and there is now due thereon the sum of seven thousand and seventy-six dollars and $\frac{91}{100}$ ($7,076.91).

Wherefore the defendant prays judgement against the plaintiff for the sum of seven thousand and seventy-six dollars and $\frac{91}{100}$ ($7,076.91) and costs of suit, the value of said note and in-
211 terest thereon according to the tenor and effect of said note.

VI.

This defendant, for another and further defense to plaintiff's complaints, answers and alleges that at the time of the execution of the three promissory notes mentioned in plaintiff's complaint the plaintiff and this defendant entered into a contract in writing, a copy of which is hereto attached and made a part hereof and marked Exhibit "B," wherein the plaintiff, as a part of the consideration of the three said promissory notes, sold and assigned and expressly stipulated that the three said promissory notes should be received in payment for all its right, title, and interest in and to that certain right in action wherein Hugh McCrum was plaintiff and W. A. and P. P. Daggs *was* defendant and plaintiff was intervenor, over that certain five thousand-dollar note marked Exhibit "A" herein, and mortgage securing the same.

That at the time of the said purchase and assignment of the said right in action involving the said five-thousand-dollar note and mortgage, as aforesaid, the makers of said note were and ever since have been and are now actually and notoriously insolvent, all of which the plaintiff well knew, and it was further agreed between the plaintiff and this defendant that the said litigation and suit aforesaid should be carried on in the name of plaintiff until the said cause of action should be determined and settled, and that plaintiff should pay all costs of said litigation accrueing prior to Nov. 1st, 1894, and this defendant should bear all costs accrueing thereafter. Defendant says that he has paid out and expended
212 large sums of money in the prosecution of said suit, to wit, forty-five and sixty-five 100 ($45.65) as transcript fee from court

below, and the sum of five hundred dollars ($500.00) as costs, and expended work and labor of the reasonable value *and* more than five hundred dollars ($500.00), and duly performed all the conditions of said contract on his part, but that the plaintiff has failed and refused to perform the conditions of its said contract in this, that it has failed to pay the expenses that accrued prior to Nov. 1st, 1894, to wit, the transcript fee aforesaid, and has wholly failed and refused to allow its name to be used in the continuation of the said suit and wholly failed and refused to sign the bond in appeal to court of last resort as principal, all to defendant's damage in the sum of ten thousand one hundred and twenty-two and $\frac{55}{100}$ dollars ($10,122.55).

VII.

This defendant, for another and further defense to plaintiff's complaint, answers and alleges that he pledged personal property as security to the said promissory notes with the plaintiff as follows: Certificate *to* one whole share of water stock in the Tempe Irrigating Canal Company, and certificate of one whole share and one half share of water stock in the Western branch of the Tempe Irrigating Canal Company, and certificate of one whole share and one half share in the Southern branch of the Tempe Irrigating Canal Company; that the said personal property so pledged is of the reasonable value of four thousand dollars ($4,000.00); that the plaintiff has failed and refuses to
213 account to this defendant for said stocks or their values, and has converted the same to its own use, to the defendant's damage in the sum of four thousand dollars ($4,000.00).

Wherefore this defendant prays that he have judgement against the plaintiff:

I.

That he be relieved from the payment of any interest on said three promissory notes as aforesaid.

II.

That he have judgement for his expenditures of forty-five and $\frac{65}{100}$ dollars ($45.65) transcript fee, and five hundred dollars expenses in prosecuting said suit, and five hundred dollars for work and labor as attorney in prosecuting said suit.

III.

And for five thousand dollars ($5,000.00) and interest according to the tenor and effect of the said five-thousand dollar note, marked "Exhibit A," pleaded as a counter-claim herein.

IV.

And for four thousand dollars ($4,000.00), the value of the said water stocks converted.

V.

And for two thousand dollars' damages, and for costs of suit, and for general relief.

A. J. DAGGS.

A. J. Daggs, being first duly sworn, says that he too read
214 the foregoing answer and knows the contents thereof, and the same is true.

A. J. DAGGS.

Subscribed and sworn to before me this 12th day of Oct., 1896.
J. E. WALKER, *Clerk.*

Contract.

It is agreed by and between the Phœnix National Bank and A. J. Daggs, all of Phœnix, Maricopa county, Arizona Territory; that for and in consideration of the giving of certain promissory notes aggregating in the sum of nine thousand seven hundred and forty-one and $\frac{72}{100}$ dollars ($9,741.72) dated Nov. 1st, 1894 and signed by A. J. Daggs and secured *and* by mortgage of date Nov. 28th, 1894, on real and personal property described therein, — have sold assigned, transferred and set over unto the said A. J. Daggs all their right, title and interest in and to a certain promissory note signed by W. A. Daggs and P. P. Daggs as partners doing business under the firm, name and style of W. A. and P. P. Daggs and W. A. and P. P. Daggs as individual*ly* for five thousand dollars ($5,000.00) and secured *on* first mortgage on 35,000 sheep in Coconino county, Arizona Territory and given by aforesaid W. A. and P. P. Daggs partners, and W. A. and P. P. Daggs individuals to Thos. Armstrong, Jr. and now owned by the Phœnix National Bank of Phœnix, Arizona Territory, and which said note of $5,000.00 is dated July 1st, 1893
215 and bears interest at the rate of 1 and ¼ per cent. per month payable quarterly and which said nine thousand seven hundred and forty-one and $\frac{73}{100}$ ($9,741.73) dollar note is received in full payment for the said five-thousand-dollar note hereinbefore described.

It is agreed that the said five-thousand-dollar note herein described is now in litigation between the Phœnix National Bank of Phœnix, Arizona Territory and Hugh McCrum of San Francisco, Cal., and the assignee D. A. Abrams as assignee of the Bank of Tempe, of Tempe, Arizona Territory, to establish and determine the priorities of rights under mortgage between the said litigants hereinbefore mentioned which said cause of action and rights of the Phœnix national bank under its first mortgage in said litigation described is also hereby sold, assigned, transferred and set over unto A. J. Daggs for the above nine thousand seven hundred and forty-one and $\frac{73}{100}$ dollars ($9,741.73).

It is further agreed that the aforesaid cause of action described, shall be continued in the name of the Phœnix national bank until the case is determined and settled, but it is further agreed that from

this date, Nov. 1st, 1894, A. J. Daggs shall pay the costs that shall hereafter accrue in the said cause.

Dated this 28th day of November, 1894.

THE PHŒNIX NATIONAL BANK,
By JAMES A. FLEMING, *President.*
A. J. DAGGS.

216 In the Supreme Court of the Territory of Arizona.

R. E. DAGGS ET AL., Plaintiff- in Error,
vs.
THE PHŒNIX NATIONAL BANK, Defendant in Error.

Exhibits G, H, I, J.
Filed Feb. 9th, 1898.

PL'T'F'S EX. I. No. 2555.

$35.42. PHŒNIX, MARICOPA COUNTY, ARIZONA, *July* 2, 1896.

Received from Phœnix national bank thirty-five and $\frac{42}{100}$ dollars for the redemption of tax-sale certificate No. 98, dated July 6th, 1895, for territorial and county taxes for year 1894, on N. W. ¼ of N. W. ¼, sec. 35, T. 1 S., 4 E.; assessed to A. J. Daggs and sold to R. E. Daggs for $27.25.

D. L. MURRAY,
Treasurer of Maricopa County, Arizona.

PL'T'F'S EX. J. No. 2555.

$52.48. PHŒNIX, MARICOPA COUNTY, ARIZONA, *July 8th,* 1896.

Received from Phœnix national bank fifty-two and $\frac{48}{100}$ dollars for the redemption of tax-sale certificate No. 128, dated July 6th, 1895, for territorial and county taxes for year 1894, on
217 S. ½ of S. E. ¼ of S. W. ¼, sec. 22, T. 1 S., R. 4 E.; assessed to Goodwin Bros. and sold to R. E. Daggs for $40.37.

D. L. MURRAY,
Treasurer of Maricopa County, Arizona.

PL'T'F'S EX. G. No. 2554.

$13.03. PHŒNIX, MARICOPA COUNTY, ARIZONA, *July 8th,* 1896.

Received from Phœnix national bank thirteen and $\frac{3}{100}$ dollars for the redemption of tax-sale certificate No. 97, dated July 6th, 1895, for territorial and county taxes for year 1894, on S. 20 acres of tract of E. ½ of N. W. ¼, sec. 19, T. 1 S., R. 5 E.; assessed to W. A. & P. P. Daggs and sold to R. E. Daggs for $10.03.

D. L. MURRAY,
Treasurer of Maricopa County, Arizona.

PL'T'F'S EX. H. No. 2555.

$22.62. PHŒNIX, MARICOPA COUNTY, ARIZONA,
July 2nd, 1896.

Received from Phœnix national bank twenty-two and $\frac{62}{100}$ dollars for the redemption of tax-sale certificate No. 100, dated July 6th, 1895, for territorial and county taxes for year 1894, on S. 40 acres of W. 100 acres of N. W. ¼, sec. 19, T. 1 S., R. 5 E.; assessed to A. J. Daggs and sold to R. E. Daggs for $17.46.

D. L. MURRAY,
Treasurer of Maricopa County, Arizona.

218 In the Supreme Court of the Territory of Arizona.

R. E. DAGGS ET AL., Plaintiff- in Error,
vs.
PHŒNIX NATIONAL BANK, Defendant in Error.
} Exhibit F. Filed February 9th, 1898.

Realty Mortgage.

Know all men by these presents, that I, R. E. Daggs, mortgagor of Phœnix, county of Maricopa, Territory of Arizona for and in consideration of one dollar and as security for the three promissory notes of A. J. Daggs hereinafter fully set out and for other and further valuable consideration to me in hand paid by the Phœnix National Bank of Phœnix, Maricopa —, Arizona, mortgagee, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said The Phœnix National Bank all that certain premises described as follows, to wit:

The south half of the southeast one-quarter of section fifteen township one (1) south range 5, east of Gila and Salt River base and meridian; also four water rights in the Consolidated Canal Company represented by certificates No. 635, 636, 639, and 640; also the northeast quarter and fifty-three and one-third acres of the northwest quarter of section nineteen (19) township one (1), south range five (5) east of Gila and Salt River base and meridian,
219 the last-mentioned fifty-three acres being further described as follows: Beginning at the northeast corner of said northwest quarter section running thence 830 feet west along the north line of said section thence twenty-six hundred and forty feet south to the southern boundary of said quarter thence 830 feet east along said southern boundary thence twenty-six hundred and forty feet along the eastern boundary of said quarter section north to the plan of beginning. Together with all the water rights and shares appurtenant to said lands, all lying within said county of Maricopa, Territory of Arizona, also all of the north one-half (½) of the southwest quarter (¼) and the south one-half (½) of the northwest quarter (¼) and the northwest quarter (¼) of the northwest quarter (¼) of section ten (10), township one (1) north range five (5) east of Gila and

Salt River base and meridian, with all water rights thereto appurtaining. To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said The Phœnix National Bank and its heirs and assigns forever.

This conveyance is intended as a mortgage to secure the payment of three certain promissory notes, given by A. J. Daggs of date Nov. 1st, 1894; which said notes are in words and figures following, to wit:

No. —. PHŒNIX, ARIZONA, *Nov.* 1*st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay to the Phœnix national bank or order, the 220 sum of six thousand dollars, in U. S. gold coin with interest thereon in like gold coin, at the rate of ten per cent. per annum from date until paid. Interest payable annually. All payable at Phœnix, in Maricopa county, Arizona, and in case suit is brought hereon I further agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$6,000.00. A. J. DAGGS.

Due —— —, 189–.

No. —. PHŒNIX, ARIZONA, *Nov.* 1*st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay to the Phœnix national bank or order, the sum of twelve hundred and forty-one and $\frac{73}{100}$ dollars in U. S. gold coin, with interest thereon in like gold coin, at the rate of ten per cent., per annum from date until paid. Interest payable annually. All payable at Phœnix, in Maricopa county, Arizona, and in case suit is brought on this note I agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$1,241.73. A. J. DAGGS.

Due —— —, 189–.

No. —. PHŒNIX, ARIZONA, *Nov.* 1*st*, 1894.

On or before one year after date, without grace, for value received I promise to pay to the Phœnix national bank or order the sum of twenty-five hundred dollars in U. S. gold coin, with interest thereon in like gold coin, at the rate of ten per cent. per annum from date until paid. Interest payable annually. All payable at Phœnix, in Maricopa county, Arizona, and in case suit is brought on this note I agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$2,500.00. A. J. DAGGS.

Due —— —, 189–.

And this instrument shall be void if said promissory note-, principal and interest be well and truly paid when due, according to the tenor

and effect thereof. But it is distinctly understood and agreed
221 that if the interest on said promissory note-, or the principal thereon, shall not be punctually paid when the same shall become due, as in said promissory note- mentioned, then and in such case, the principal sum of said note-, and the interest thereon, shall be deemed and taken to be wholly due and payable, and proceedings may forthwith be had by the said mortgagee the Phœnix national bank, its heirs, executors, administrators and assigns, for the recovery of the same, either by suit on said note- or on this mortgage and notes; and in any suit or other proceedings that may be had for the recovery of the said principal sum and interest thereon, it shall and may be lawful for the said mortgagee, its heirs, executors, administrators or assigns to include in the judgement that may be recovered attorneys' fees not exceeding two per cent. thereon upon the amount found due the plaintiff on said notes and this mortgage, or in case of settlement after suit brought, but before judgement rendered, then 1 per cent. on amount found due at the time of settlement, as well as all payments that the said mortgagee its heirs executors, administrators or assigns may be obliged to make for its security, or on account of any taxes, charges, incumbrances or assessments whatsoever on the said premises legally laid or made thereon.

Witness my hand this 28th day of November, A. D. 1894.

R. E. DAGGS. [SEAL.]

Signed, sealed, and delivered in the presence of—

——— ———.

222 TERRITORY OF ARIZONA, }
County of Maricopa, } ss:

Before me, L. H. Chalmers, a notary public in and for the county of Maricopa, Territory of Arizona, on this day personally appeared R. E. Daggs, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 28th day of November, A. D. 1894.

[SEAL.] L. H. CHALMERS,
Notary Public.

PL'T'F'S EX. F. No. 7796.

Realty Mortgage.

From R. E. Daggs to the Phœnix National Bank.

Dated November 28th, 1894.

Filed and recorded at request of L. H. Chalmers, November 28th, 1894, at 4.25 p. m., Book 20 of Mortgages, pages 205, 206, 207, and 208.

NERI OSBORN,
County Recorder,
By H. C. MEADOR, *Deputy.*

223 TERRITORY OF ARIZONA, }
County of Maricopa. }

I, Neri Osborn, county recorder in and for county and Territory aforesaid, do hereby certify that the within instrument was filed for record at 4.25 p. m. on this 28th day of November, 1894, and duly recorded in Book No. 20 of Mortgages, records of Maricopa county, Arizona, at pages 205, 206, 207, and 208.

Witness my hand and officia! seal the day and year above written.

[SEAL] NERI OSBORN,
County Recorder,
By H. C. MEADOR, *Deputy.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, *vs.* R. E. DAGGS & A. J. DAGGS, Defendant-. } No. 2554. Case Reopened and Tried after Consolidation with Cases No. 2555 & 2556.

Reporter's Transcript of Evidence.

Trial in the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa, before
224 his honor A. C. Baker, judge; tried to this court on the 26th and 27th days of October, A. D. 1896, at the court-house, in the city of Phœnix, said county and Territory.

Appearances: L. H. Chalmers, Esq., & Eugene S. Ives, for plaintiff; A. J. Daggs, Esq., & R. E. Daggs, in person, for defendant-.

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Filed January 27th, 1898.

EDWIN S. GILL, *Clerk.*
CHAS. H. HOLMES,
Court Reporter, Third Judicial District, Territory of Arizona.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, Plaintiff, *vs.* R. E. DAGGS & A. J. DAGGS, Defendants.	Docket No. 2554. By Consent of Counsel and on Order of the Court, Consolidated with Nos. 2555 — 2556 for Trial and Judgement.

225 This cause, having been heretofore tried and submitted, is on this the 26th day of October, A. D. 1896, reopened on motion of defendants, and further proceedings had therein as follows, to wit:

MONDAY, *October 26th*, 1896.

His honor A. C. Baker, judge, being upon the bench and parties to this cause present in open court, the following proceedings were had, to wit:

By Mr. A. J. DAGGS, counsel for defendants: I have a motion in there, if your honor please.

By the COURT: Very well, what is it?

The counter-claims are confessed by plaintiff, they move for judgement upon the counter-claims, and there is no reply upon the counter-claims.

By EUGENE S. IVES, of counsel for plaintiff: The amended answer was served in open court and we did proceed to trial, and I have never known of a practice where a written answer was necessary.

By the COURT: I guess that you are clearly within this rule, and I will allow you to make a written denial, and you can have a half hour in which to do so.

By Mr. CHALMERS: The statute says that you don't have a position to constitute a defense.

By the COURT: I will overrule the motion, and give the parties 30 minutes to reply to the counter-claim.

(Defendants except to the ruling of the court, and except to the allowance by the court to the filing of the answer by plaintiffs.)

A recess taken for 30 minutes.

226 By the COURT: Are you ready in this case of the Bank against Daggs *et al.?*

By Mr. CHALMERS: Plaintiffs file their answer to the reply.

By the COURT: The demurrer is overruled.

By Mr. CHALMERS: Will we have to go into the general specific denial?

A. By the COURT: Yes.

By Mr. CHALMERS: Plaintiffs ask leave to file this also in the other two cases a similar answer to be drawn up during the day.

By the COURT: Very well.

By Mr. DAGGS: The defendants file their answer to the supplemental bill and move to strike it out.

By the COURT: I will deny the motion.

By Mr. DAGGS: I have a demurrer also to the supplemental complaint.

Demurrer was overruled by the court, and defendants except to the ruling of the court.

By the COURT: Proceed with your merits.

Cross-examination of R. E. DAGGS, Esq., a witness duly called on behalf of the plaintiff, — was sworn and according to law examined and testified as follows, to wit:

Examination by Mr. EUGENE S. IVES:

Q. You testified that you demanded certain water rights which were held by the Phœnix national bank, and which are held as collateral security to the notes in suit?

227 By Mr. DAGGS: I would like to know whether counsel is calling this witness for himself or on cross-examination?

By Mr. IVES: I am calling him for further cross-examination.

Defendants object to the introduction of any further evidence in this case because there is no issue. (Objection overruled, and defendants except to the ruling of the court.)

Q. Please tell us to whom you made the demand and what you said and what the party said.

A. I didn't testify to that.

Q. Did you ever have any conversation with anybody with respect to reprocuring possession of those water rights?

Defendants object to the introduction of this testimony on the ground that there is no issue. Objection overruled, and defendants except to the ruling of the court.

A. That is not what I testified to at all.

Q. I didn't ask what you testified to at all. Did you have any conversation with anybody at all with respect to your gaining possession of those water rights?

A. Which one do you refer to?

Q. The water rights held by the Phœnix national bank as collateral security for the notes in suit?

Defendants object to the question and say that he didn't testify to them except in general. Objection overruled, and exception noted.

WITNESS (continuing): There are two sets of water stocks.

Q. Well, to any of them, then.

A. In regard to reprocuring them?

228 Q. Yes.

A. No, sir.

Q. Have you ever made a demand for those water-right stocks?

A. I have not so testified.

Q. Have you ever made a demand for those water-right stocks?

A. No, sir. Mr. Belcher refused to recognize any rights that we had in the stocks whatever.

Plaintiff moves the court to strike out all the rest of this testimony that is not responsive, counsel remarking, "I finally got one answer out of him." Motion overruled, the court remarking, "Go along."

By Mr. IVES: Now, Mr. Daggs, a certain agreement, which has been introduced in evidence, between the Phœnix national bank with respect to the suit brought against the Phœnix national bank by Crum or by the bank against McCrum—have you ever read that agreement?

A. Yes, sir.

Defendant objects to the introduction of any evidence on that question, for the written agreement is there. Objection overruled, and defendants except to the ruling.

Q. State what you know about this agreement.
A. I know that it was made.
Q. Is that all you know about it?
A. I know what its contents is.
Q. State what you know about that agreement.
A. I know that it was made and I know its contents.

229 By Mr. A. J. DAGGS: What is the purpose of this question?

By Mr. IVES: If it was my habit to disclose my purpose, I would tell you.

By Mr. DAGGS: If you propose to contradict the witness, I object to it.

By Mr. IVES: In this connection I would like to call your attention to the fact that the defendant offered to prove by this witness that if a certain note transferred by the bank to A. J. Daggs was not collected, that the agreement was that the amount of such note should be credited upon the three notes which are the subject-matter of this suit. We objected to that testimony, and your honor sustained the objection. Thereafter your honor indicated another rule.

When Mr. A. J. Daggs testified we proposed that such testimony should be admitted for what it was worth. While we don't wish to be placed in a position of objecting to it, we desire to call your attention to it.

By the COURT: I know that I allowed him to introduce proof as to what he understood was the agreement in the accepting of this $5,000.00 note.

By Mr. IVES: I think that some testimony was refused with respect to the witness R. E. Daggs, and I presume that was by inadvertence on your honor's part, so that you may permit this witness the same proof, and I will keep my objection the same.

Then the objection which I made is overruled instead of being sustained?

By the COURT: Yes, as to the surety. I will withdraw the
230 ruling rejecting that testimony, and you can ask this witness the question.

By Mr. A. J. DAGGS: I don't care to ask any questions; I am objecting to all of this testimony.

That is all.

Witness excused.

A. J. DAGGS, Esq., a witness duly called, sworn according to law, and examined upon the part of plaintiff, in further cross-examination testified as follows, to wit:

Examination by Mr. C. S. IVES:

Q. I served notice upon you——

By Mr. DAGGS: I am objecting to testifying, because there is no issue between the parties at this time.

(Objection overruled, and defendants except to the ruling of the court.)

COUNSEL FOR PLAINTIFF (continuing): I have served notice upon you to produce certain papers, and I just now hand you the proof of service. Will you give it to me? I gave that proof of service to you a few moments ago only to look at.

A. I handed it back to you a moment ago.

Q. I ask you in pursuance of that notice to produce those papers.

A. Read your notice to the court.

Q. I will read it after you pass upon the question. I have asked you to produce a certain assignment executed by the Phœnix national bank to A. J. Daggs of certain promissory notes and other securities.

231 A. Read your notice.

Q. (Addressing the court.) I have asked him to produce it; he may or he may not do so.

A. I don't know what he wants.

Q. I will ask you to produce a certain assignment, bearing date the 28th day of November, 1894, made by the Phœnix national bank, by James A. Fleming, president, to A. J. Daggs, of certain promissory notes, two of date January, 1893, for $400.00, and two of July 5th, signed Robert E. Daggs and A. J. Daggs, at 90 days after date, and three notes dated March 10th, 1894, signed by R. E. and A. J. Daggs, one for $5,000, one for $7,000, and one for $3,000, and I ask you to produce that assignment.

A. I don't know what you want. You have duplicates of every paper that is in our possession, I am satisfied.

Q. I will also ask you to produce the promissory notes included in the assignment, as I have just stated.

A. If counsel will read his notice, I will object to it. I have the whole three, and don't know what you want.

Q. You testified that you have expended five hundred dollars in preparing and filing the appeal to the supreme court in the case of The Phœnix National Bank against Hugh McCrum; is that correct?

A. No answer.

Q. Did you expend five hundred dollars in preparing and filing

the appeal to the supreme court in the case of The Phœnix National Bank against Hugh McCrum?

A. That is what I testified to, and that is what I put in
232 my bill for.

Q. To whom did you pay it?

A. Under our statute—if he is objecting to the statement of account he must file a notice asking for a statement of account, and if he didn't do it he is not now entitled to it.

Defendants object to the answer. Objection overruled, and defendants except to the ruling of the court.

A. I have not the items by me now, but I paid for a transcript of evidence and for a brief, and for the printing of the same something over two hundred dollars.

Q. You paid for printing something over $200.00?

A. Yes, sir; and I paid the docket fee of $20.00, and I paid the expenses of the contempt procedure—I don't know how much that was, but it was quite a good deal—in carrying your case for you and my own expenses in carrying your own case for you, not including my fee.

Q. You paid over $200.00 for printing?

A. Yes, sir.

Q. What did you have printed?

A. The briefs and abstracts of the files on appeals. Every particle of it had to come up, and it had to be printed.

Q. Where was that work done and paid for?

A. It was done by the Wooding Printing Company at Kansas City, Missouri.

Q. When was that done?

A. At the time I received the briefs.

Q. When was that?

233 A. I don't know.

Q. Have you got a receipt for that expense?

A. Yes, sir; I have at my office.

Q. When was that bill paid?

A. It was paid at the time I received the briefs.

Q. When was that?

A. It was some time in January, I believe, or the first part of 1894 or 1895. I don't just remember, but I can go and get the dates and refer to them.

Q. What was this contempt procedure that you speak of?

A. That arose over this McCrum suit.

Q. Who was in contempt?

A. I was cited for contempt, but the court never adjudged me guilty, for upon hearing of the facts in the case the court released me, but I paid the expenses that they adjudged me to pay. They adjudged me to pay the expenses, and I paid them.

Q. Then the contempt procedure was against you?

A. It was against my supplemental brief, and they cited me to show cause why I shouldn't be punished for it, and I showed cause, and they didn't punish me.

Q. What were the expenses of that procedure?
A. It run on up to $50.00 or $75.00.
Q. What expenses were you necessarily put to in the matter?
A. Every paper and every order that was made, and every filing and the fees of the supreme court clerk in docketing every
234 item of costs on it, was charged to me, and the order of the court was that I should pay it, and I paid it.
Q. What were those proceedings brought against you for, if they were proceedings that were instituted against the plaintiff in that action?
A. I filed an answer to the brief of the appellant.
Q. What was it in your answer that instituted this proceedings that you speak of?
A. It was pertaining to this case to get into the rights that we were entitled to.
Q. And you set this up as a charge against the Phœnix national bank in this case?

By the COURT: I think the witness has answered fully enough; he says that it was a contempt proceeding.
WITNESS continuing: My contention is that it accrued out of the same transaction, and it was an expense that I should be entitled to, for I paid it in cash.

Q. Now, Mr. Daggs, you testified in answer to the question by the court that you knew that the Phœnix national bank guaranteed the note which was the subject-matter of the suit brought by the Phœnix national bank against Hugh McCrum; that they guaranteed it to you.
A. That is not the question.
Q. Did you say then or do you say now that the Phœnix national bank guaranteed to you the amount of that note?

By Mr. R. E. DAGGS: I would like to ask on behalf of the defendant R. E. Daggs whether he made a verbal guarantee or otherwise.
235 By Mr. IVES: I am asking the question in my own language.

A. He gave me a written contract and assigned the note to me, and by operation of law it is a guarantee.
Q. And that is what you refer to?
A. Yes; that is what I am standing on under the statute.

By the COURT:

Q. Then I understand you to say that there was no guaranty verbally or by any other means than this written contract.
A. Other than a verbal agreement. I have not stated that there was a verbal agreement, but it comes by the written contract. He is liable as assignor under the statute.

That is all.

Defendants move the court to strike out all of the evidence, as there is no issue, and it is immaterial, incompetent, and irrelevant.

Objection overruled, and defendants except to the ruling of the court.

Witness excused.

Mr. L. H. CHALMERS, a witness duly called, sworn according to law, and examined upon his oath, testifieth as follows, to wit:

Examination by Mr. IVES, counsel for plaintiff:

Q. Were you the attorney for the Phœnix national bank pending the negotiations resulting in the execution of the notes which are the subject-matter of this action?

Defendants object to the introduction of any further testi-
236 mony in this case by this witness pertaining to this litigation, for the reason that there is no issue between the defendant A. J. Daggs and this plaintiff.

Objection overruled by the court, and defendants except to the ruling of the court.

By Mr. IVES: We want to put in evidence the notice to produce papers that I have served on the attorney for the defendant-.

By the COURT: Very well.

Counsel for plaintiff reads the same to the court.

By the REPORTER: I have forgotten the number of exhibits already offered in this case, but will identify this with my own initials.

Same was thereupon duly admitted and identified as Plaintiff's Exhibit C. H. H.

By Mr. IVES: I have asked that they produce the assignment by the Phœnix national bank to A. J. Daggs of certain notes, which, together with the note which has been discussed before your honor, form the consideration for the three notes, the subject-matter of this suit.

The one note which they set out as a counter-claim was a part of the consideration for the three notes which we are suing upon. This bill of sale transferred other securities which we have. One note formed all of the consideration, and I have asked them to produce the original bill of sale delivered to them at that time, and I now again ask them and they refuse to produce it, and I ask the court to allow plaintiff to prove the contents of it by this witness.

By the COURT: Very well; go ahead.

237 By Mr. CHALMERS:

A. With respect to the contents of that bill of sale——

(Interruption. Defendants object to their proving the contents of that notice, because their notice is not a sufficient notice to produce papers as in the case of —— —— *vs.* —— ——. Counsel for defendant- reads authority to the court; whereupon the court over-

ruled the objection, and defendants excepted to the ruling of the court.)

By Mr. DAGGS: I object to the introduction of that testimony, for the reason that it is a secondary evidence and because no notice, as required by law, has been served upon the defendant-; and, further, that because there is no issue upon this proposition.

We admit that part of the consideration. There is no issue about that part of the consideration. Why, now, are they entitled to produce the evidence before this court?

The objection is overruled, and defendants except to the ruling of the court.

By Mr. IVES: Do you know any addition, Mr. Chalmers, to the agreement in evidence between the Phœnix national bank and A. J. Daggs with respect to the McCrum matter? Was there any other paper in the nature of a bill of sale or assignment that was delivered by the bank to A. J. Daggs?

A. Yes, sir.

Q. Do you know the contents thereof?

A. Generally, I do.

Q. You will please state the contents of the same to the
238 court to the best of your recollection.

A. There was a copy of it made at the same time.

Q. Is that paper in your possession—the copy of it?

A. Yes, sir.

Plaintiffs offer the same in evidence.

(Defendants object to the introduction of the copy, as the original is the best evidence.)

By the COURT:

Q. Have you it with you?

A. I have.

Q. Allow me to see it.

(Witness passes the same to the court for perusal.)

(Continued by the COURT:)

Q. That calls for three notes—$7,000.00, $4,000.00, and $3,000.00—made by A. J. Daggs to the order of R. E. Daggs. Did you ever see those notes?

A. Yes, sir.

Q. When they were in the possession of the Phœnix national bank was the endorsement of R. E. Daggs upon them?

A. Yes, sir.

By Mr. IVES: Certain water rights were given as collateral security for the three notes, the subject-matter of this suit?

A. Yes, sir.

(Defendants object to the question as leading.)

Q. At the same time when those notes and mortgage were signed do you know what was the condition of the title to these water rights?

A. Yes, sir.

(Defendants object to this testimony as immaterial.)

239 Objection overruled and exception taken.

Q. Repeat the question.

Reporter repeats the question, and witness answers "Yes."

Q. Was there any litigation effecting them?

A. Yes.

Q. Was the Phœnix national bank aware or was it not aware of it when it accepted them as collateral security?

A. It was aware of it. It took them at this time subject to the knowledge of the litigation.

(Defendants object to that testimony as immaterial.)

By the COURT: When that was signed and delivered who got it?

A. This is a part of and cotemporaneous with the assignment that all of this talk has been about. In the settlement—the settlement was a general clean up of all the stuff that the Phœnix national bank held against the Daggs, and the bank agreed to give them back everything that they at that time held, and took those three notes with the water rights in consideration of it.

The Daggs had previously drawn a contract up where they claimed a guaranty and I had drawn up this, covering all the other notes.

By the COURT: That refers to the other three notes, but not to this $5,000.00 *dollar* note?

A. No, sir; it refers to all the other stuff.

By the COURT: Then that exhibit can be admitted and filed in the other case.

(Same heretofore identified as C. H. H.)

By Mr. IVES: That is all.

240 Cross-examination.

By Mr. R. E. DAGGS:

Q. Wasn't that overdraft attached to that consideration with the papers to the assignment?

A. Yes; and those notes were collateral to it.

Q. Do you mean to say that the overdraft was part of the consideration, and that the other papers were collateral to the overdraft?

A. Yes; partially so. The overdraft and all the other papers were in consideration, and we held those other papers as collateral security to the debts you owed us.

Q. As security for the overdraft or the other debts?

A. The overdraft and the $5,000 note signed by P. P. and W. A. Daggs and other notes.

Q. Isn't it a fact that these other notes described there, as stated in that assignment, was collateral security to that overdraft, and do you know that was all their collateral, too?

A. I am not so sure about that; I don't know about that.

Q. Doesn't that so state?

A. No, sir; I don't think so; but, anyhow, I don't know about that, for those collaterals were taken before I became the attorney for the bank.

Q. You don't know whether they were collateral to anything else or not?

A. No, sir; but I do know this, that this whole business
241 was turned over to you under the general settlement.

Q. Then you don't know anything about the contract whatever?

A. Yes; I made this contract.

Q. Don't you know this to be a fact: that the overdraft was a part of that contract that was assigned?

A. I am pretty well satisfied that that is the case. Yes; and that these securities mentioned here were collateral to the overdraft.

Q. Yes; and the Phœnix national bank only held them as collateral to that?

A. I will qualify that by saying that these securities mentioned in here were taken when I was not attorney for the bank, but this settlement was made when I was attorney for it.

By the COURT: Now, the facts themselves about this contract. I will hear you briefly as to whether the fact of the transfer, as indicated on this contract, of the promissory note makes the bank responsible for the face value of the note.

By Mr. R. E. DAGGS: One moment. Was this overdraft a charge or a debt on authority of the defendants in this case when it was assigned by that contract?

A. I don't know about that.

Q. Don't you know that it was an overdraft by the Bank of Tempe and not these defendants?

A. Yes; but it may have been a charge against you, all the same.

That is all.

242 Redirect examination.

By Mr. IVES:

Q. Do you know anything about a bond given by the Daggs to secure business relations between the Bank of Tempe and the Phœnix national bank?

A. Yes, sir.

By R. E. DAGGS: That is a bond to secure a debt of the Bank of Tempe?

A. Yes, sir; by overdrafts.

Q. Who was it signed by?

A. I don't know.

Q. Wasn't it signed by W. A. and P. P. Daggs?
A. I don't know; I suppose so.

That is all.

Witness excused.

By Mr. E. S. Ives: As to the general question of the bank's liability upon a bill of sale of commercial paper, in the absence of fraud or representation, the general principle is axiomatic.

Plaintiffs offer the tax receipts under the amended pleadings, one for $35.42 and the other for $52.48.

Defendants object to the introduction of the tax receipts, as they are certificates of redemption of taxes and not tax receipts.

Objection overruled by the court, and defendant excepts to the ruling of the court.

243 Same, being duly admitted in evidence, was thereupon marked Plaintiff's Exhibits G and H respectively.

By the Court: The hour for adjourning having arrived, we will adjourn this cause till tomorrow morning at 9 o'clock.

Court thereupon adjourned.

In Open District Court, Tuesday, October 27th, 1896.

His honor A. C. Baker being upon the bench, parties to this cause present in open court and represented by their respective counsel, Messrs. Chalmers & Ives, for plaintiff, and R. E. Daggs in person, and A. J. Daggs, attorney for the defendants, the following proceedings were had:

By Mr. Ives: We have some stipulations, if your honor please, with respect to the case tried yesterday, No. 2554, and the cases Nos. 2555 and 2556.

By the Court: Very well; go ahead.

By Mr. Ives: It is stipulated in open court that the three cases, Nos. 2554, 2555, and 2566, be hereby consolidated, and that the evidence heretofore taken in the action No. 2554 be the evidence in such other actions Nos. 2555 and 2556, and that if judgement be rendered in favor of the plaintiff in said cause that but one judgement be entered in said three causes, and that such judgement shall provide that the property described by the several mortgages set forth in the three actions above numbered be sold successively, and that if the sale of the property secured by the

244 mortgage set forth in No. 2554 be sufficient to pay the judgement in full that the judgement shall be satisfied and be no longer a lien upon the property covered by the mortgages under 2555 and 2556.

Defendants object to that.

By Mr. Ives: I will try it again. That all of the property covered by the three mortgages set forth in the three several complaints, or so much thereof as may be necessary, be sold until the amount found due upon the said notes, with interest and taxes, be satisfied in full and the charges and costs of sale be satisfied in full.

By Mr. A. J. DAGGS: We didn't agree to that.

By the COURT: I think I can get you out of your difficulty. Let me try it. It is agreed and stipulated in open court and shall become a part and parcel of the minutes of the court in this case, by and with the consent of the counsel for the respective parties, that actions No. 2554, 2555, and 2556 be, and the same are hereby, consolidated for trial and judgement, and that the evidence heretofore introduced in the case No. 2554 be, and the same shall be, considered all of the evidence in the cases Nos. 2555 and 2556, except that the notes, mortgages, and the tax receipts, evidence of payment of taxes, as described in cases Nos. 2555 and 2556, shall be considered also in evidence, and but one judgement shall be rendered in all three cases.

By Mr. IVES: And that the evidence hereafter to be introduced—we desire to offer in evidence our tax receipts and mortgages—shall be admitted.

245

By the COURT, continuing: Yes; that is understood to be included as well as these other certificates.

Plaintiffs offer in evidence the 4 tax receipts, I, J, K, L, and L 2.

Defendants object to the introduction of any further evidence in this case. We object to the introduction of the tax receipts, because they are not tax receipts, but certificates of sale, and because there is no issue.

Objection overruled by the court, and defendants except to the ruling of the court.

(Same were thereupon marked Plaintiff's Exhibit G, H, I, J, K, L, L 2, tax receipts and certificates, and duly admitted in evidence.)

By Mr. IVES: I would like to ask Mr. Daggs if they refuse by any act except by refusing to sign the bond.

By Mr. A. J. DAGGS: The case has been submitted and my testimony shows for itself.

Plaintiffs ask leave of the court to recall Mr. A. J. Daggs. If I remember the testimony, they refused to let the suit be carried on in any manner. What party or what parties of the Phœnix national bank or what individual refused?

(No response to the enquiry.)

Plaintiff asks permission on this one point to recall the witness A. J. Daggs, which was granted by the court.

The court remarking, "Go ahead and put the witness on the stand."

246 Mr. A. J. DAGGS, a witness called on behalf of the prosecution, was examined, and testified as follows, to wit:

Examination by Mr. EUGENE S. IVES:

Q. Go ahead and answer the question which I have just put to you.

(Reporter reads the last question.)

A. I have talked to Mr. Belcher about it.

Q. What did Mr. Belcher say?

A. He said that he would not recognize the suit.
Q. What did he say?
A. He said that he wouldn't carry on the suit in his name.
Q. Wouldn't carry it on in the name of the bank?
A. No, sir; he wouldn't.
By Mr. CHALMERS: Wasn't that conversation in relation to the signing of the bond?
A. Yes; that is where the conversation arose.

Q. May it please the court, we have sent for Mr. Belcher, and we want to rebut this evidence.
We admit that we refused to sign your bond, but not to let the case be appealed.
By Mr. DAGGS: Defendants object to any further rebuttal; it is only taking up the time of the court, and the case has already been submitted.
That is all.

Witness excused.

247 Mr. F. S. BELCHER, a witness duly called on behalf of the plaintiff, was duly sworn according to law and examined upon his corporal oath, and testifieth as follows, to wit:

Defendants object to the introduction of any more testimony in this case, because the case has been submitted on the stipulation, and because there is no issue before the court.
Objection overruled, and defendants except to the ruling of the court.

By Mr. IVES: Did you ever have any conversation with A. J. Daggs with respect to the use of the name of the Phœnix national bank for appeal purposes in the case of The Phœnix National Bank, plaintiff, against Hugh McCrum, defendant.
A. They presented a bond for me to sign, and I told them that I wouldn't sign the bond without the instructions of my attorney. I didn't have much conversation about the suit.
Q. Did you, at that conversation or at any other time, refuse to permit them to use the name of the Phœnix national bank in the prosecution of the suit to the supreme court on appeal?
A. No, sir; I didn't refuse anything. I didn't even refuse to sign the bond, but I told them I would have to get the attorney's instructions before I would do anything.
Q. Did Mr. Daggs or any one have any conversation with you with respect to carrying on the suit in the name of the Phœnix national bank apart from the conversation which you have testified to with regard to the bond?
248 A. No, sir; only with reference to signing the bond.
Q. And you are positive you did not refuse to permit the suit to be carried on in the name of the Phœnix national bank?
A. I am.
Q. Are you now willing that it should be carried on in the name of the Phœnix national bank?

A. Yes, sir; perfectly willing.
Q. And always have been?
A. Yes, sir; so far as I know anything about it.

That is all.

By the COURT: Is there any cross-examination of this witness?

By Mr. CHALMERS: Do you know the amount of interest due on these three different notes sued upon? And, if so, please state it.

Defendants object to the question for the reason that it has already been answered.

Q. All right.

Cross-examination:

By Mr. A. J. DAGGS: I have no questions, but surety desires to ask one question.
By the COURT: Very well.
By Mr. R. E. DAGGS: You have had several conversations about this bond, have you not?
A. With you?
Q. With A. J. Daggs.
A. Yes; I was asked to sign the bond two or three times.
249 Q. Did you at any time say what you would do in regard to the bond?
A. I substantially gave you the same answer every time—that I would have to get instructions from my attorney before I would do anything about it.
Q. Did you ever at any time tell him what you would do after you got your instructions?
A. I might have told him that I would sign the bond only on the attorney's instructing me to do so.
Q. Answer the question.
A. I have no further answer to make than I have made.
Q. Answer me yes or no.
A. I might have said to him that I would sign the bond when instructed by my attorney, but I don't remember any further conversation about it.
Q. Did you ever get any instructions from your attorney in regard to signing the bond?
A. I was never instructed to sign the bond by my attorney.
Q. Did you ever tell A. J. Daggs that you were instructed to do so on the individual instructions from your attorney?
A. I don't remember telling him so.
Q. And if you had told him so, you would have remembered it?
A. I think I would.
Q. Did you ever have any conversation about the carrying on of this suit, other than about the bond, with A. J. Daggs?
250 A. I don't call any to my mind now, anything in particular about it.
Q. Did you ever have any conversation at all about the carrying on of this suit?

A. Yes; I think Mr. Daggs told me something about it, but I referred the whole matter to my attorney.

Q. Did you ever tell him that you would give him an answer as to whether he could or could not carry on that suit in your name when you heard from the attorney?

A. No, sir; I told him that I would tell him whether I would sign the bond.

Q. Did you ever tell him that he could use your name?

A. Yes; I told him that he didn't need instructions to do so.

Q. Did you ever tell him whether you had instructions or not to sign the bond?

A. No, sir.

That is all.

Witness excused. Case closed.
Plaintiffs rest. Defendants rest.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, Plaintiff,
vs.
251 R. E. DAGGS & A. J. DAGGS, Defendants.

TERRITORY OF ARIZONA,
County of Maricopa, } *ss.*:

I, Chas. H. Holmes, court reporter of the third judicial district of the Territory of Arizona, do hereby certify that I was in attendance at the trial of the above-entitled cause in the district court of the third judicial district of the Territory of Arizona, held in and for the county of Maricopa, on the 26th day of October, A. D. 1896; that I was the duly appointed, qualified, and acting court reporter of said court on said day and am now; that as such court reporter, by agreement of the parties to this cause and under direction of the court at the trial, I reported phonographically the proceedings and all of the oral evidence adduced upon said hearing of said cause on said day and also upon the following day, October 27th, 1896, and that I filed the documentary evidence offered upon the trial of said cause with the clerk of the court upon said last-mentioned day as the evidence in said cause.

That I have this day transcribed, under the direction of the attorney for defendants, all of my said shorthand notes of the evidence and proceedings taken upon the hearing of said cause, including the objections of counsel, the rulings by the court, and the exceptions to said rulings, in the manner and at the times as therein taken and noted, and I hereby certify the foregoing twenty-
252 five pages of typewritten testimony to contain a full, true, correct, and complete statement of the said proceedings and all of the oral evidence and mention of documentary evidence as offered and admitted in said cause, and that no other evidence was therein introduced.

In testimony whereof I, as such court reporter, hereby set my official hand this 19th day of January, A. D. 1898.

CHAS. H. HOLMES,
Official Court Reporter, Third Judicial District, Territory of Arizona.

Done at Phœnix, A. T.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff,
vs.
A. J. DAGGS ET AL., Defendants.
} Cases Nos. 2554, '5, '6.

Pursuant to the order of the supreme court of the Territory of Arizona made on Jan. 24th, 1898, I, Edwin S. Gill, clerk of the above-entitled court, do hereby certify that the above and foregoing record papers of the above-entitled court in above numbered and entitled causes, being the amended answer of A. J. Daggs in case No. 2554 with the remainder of the testimony taken on the
253 trial of the said causes, together with the Exhibits F, G, H, I, J, & C. H. H., are all the papers on file in my office in said causes.

In witness whereof I have hereunto set my hand and affixed the seal of the above-entitled district court. Dated this 27th day of January, A. D. 1898.

[SEAL.]

EDWIN S. GILL,
Clerk of Dist. Court, Third Jud. Dist. of the Territory of Arizona, Maricopa County.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, Plaintiff,
vs.
DAGGS ET AL., Defendants.
} 2554, 2555, 2556. Plaintiff's Exhibit C. H. H.

To A. J. Daggs, attorney for defendants:

Please take notice that you are hereby required to produce upon the trial of the above-entitled actions all papers, bills of sale, assignments, promissory notes, letters, and memoranda affecting the issues in the above-entitled actions or relating to the circumstances thereof which are in the possession or under the control of
254 yourself or the defendants or any of them, and in default of your producing such papers the plaintiff will introduce parole testimony as to the contents thereof.

L. H. CHALMERS &
EUGENE S. IVES,
Att'ys for Plaintiff.

In the Supreme Court of the Territory of Arizona.

R. E. Daggs & A. J. Daggs, Plaintiffs in Error, *vs.* Phœnix National Bank, a Corporation, Defendants in Error.	Judgement. April 16th, 1898.

This cause having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that the judgment of the district court herein be, and the same is hereby, affirmed.

In the Supreme Court of the Territory of Arizona.

R. E. Daggs & A. J. Daggs, Plaintiffs in Error, *vs.* Phœnix National Bank, a Corporation, Defendants in Error.	Opinion. Filed April 16th, 1898.

255

Error from the district court, Maricopa county—A. C. Baker, judge.

A. J. Daggs, for plaintiffs in error.
L. H. Chalmers, for defendants in error.

Opinion by Sloan, J.

On the 28th day of November, 1894, R. E. Daggs executed a mortgage on realty situate in Maricopa county, Arizona, and on four water rights of the Consolidated Canal Company, represented by certificates, to the defendant in error to secure three promissory notes, aggregating the sum of $9,741.73 and signed by A. J. Daggs, plaintiff in error, each dated November 1st, 1894, and payable on or before one year from the date thereof and each bearing interest from date at the rate of ten per cent. per annum. On the same day A. J. Daggs, plaintiff in error, executed a mortgage to the defendant in error upon real estate in said county to secure the said promissory notes, and on the same date executed another mortgage upon other real estate in said county to secure the same indebtedness.

Separate suits were brought by the defendant in error on the 21st of February, 1896, to foreclose the three mortgages,
256 which suits were subsequently, by order of the court, consolidated and tried as one. The answer of A. J. Daggs was the same in each of the suits and set up a number of defenses. The first set up that the notes sued upon were usurious, in that the rate of interest charged was in excess of that allowed to be charged by a national bank in this Territory under the provisions of section 5197 and 5198 of the Revised Statutes of the United States, and for that reason the defendant in error had forfeited its right to collect any interest upon said notes. By way of counter-claim the answer set up that the defendant in error was indebted to plaintiff in error

A. J. Daggs upon a certain promissory note, which reads as follows:

No. 1340. Due Sept. 1st.

$5,000.00. PHŒNIX, ARIZONA, *July 1st*, 1893.

On the 1st day of September, 1893, without grace, we or either of us, for value received, promise to pay to Thos. Armstrong, Jr., at the Phœnix national bank, at their office, in Phœnix, Arizona, five thousand dollars ($5,000) in United States gold coin, with interest at the rate of 1 and ¼ per cent. per month until paid. In case of legal proceedings hereon, we or either of us agree to pay ten per cent. of amount found due hereon as attorney's fees.

W. A. AND P. P. DAGGS.

Secured by chattel mortgage of even date.

W. A. DAGGS.
P. P. DAGGS.

And endorsed on the back as follows:

Thos. Armstrong, Jr. Sept. 30th, 1893, interest from July 1st to Oct. 1st, 1893, $187.50. Dec. 30th, 1893, interest from Oct. 1st to January 1st, 1894, $187.50. April 2nd, 1894, interest from Jan. 1st to April 1st, $187.50.

That the payee of said note, Thomas Armstrong, Jr., assigned the same in blank to the defendant in error, and on the 28th day
257 of November, A. D. 1894, for a valuable consideration in writing, the latter assigned the same to the plaintiff in error A. J. Daggs, and that at the date of said assignment the makers of said note were and ever since have been and are notoriously insolvent, of all of which the defendant in error is charged to have had knowledge; and, further, that no part of said note had been paid, and that there was then due thereon the sum of $7,076.91, and judgement thereon was prayed for for said amount, together with the interest thereon, according to the tenor and effect of said note.

For a further defense and by way of counter-claim, the answer set up that at the time of the execution of the three promissory notes sued upon the defendant in error and plaintiff in error A. J. Daggs entered into a contract in writing, wherein the former, as a part of the consideration of the said notes, expressly stipulated that the said notes should be received in payment for all its right, title, and interest in and to a certain chose in action wherein Hugh McCrum was plaintiff and W. A. and P. P. Daggs were defendants and defendant in error was the intervenor, which chose in action was based upon the note for five thousand dollars signed by said W. A. and P. P. Daggs, and which was set up and contained in the aforesaid counter-claim, and which was secured by a chattel mortgage executed by the payees named in said note; that the makers of said note were at the time, had been, and were then actually and notoriously insolvent, all of which the defendant in error well knew, and that it was further agreed between the defendant
258 in error and the plaintiff in error A. J. Daggs that the litigation and suit upon said note and mortgage should be carried

on in the name of defendant in error until the said cause should be determined and settled, and that defendant in error should pay all costs of said litigation accruing prior to November 1st, 1894; that A. J. Daggs, plaintiff in error, should bear all the costs accruing thereafter; that the said plaintiff in error had paid out and expended large sums of money in the prosecution of said suit, to wit, $45.65, as costs in and about said suit which had accrued prior to said November 1st, 1894; said plaintiff in error further alleged that the defendant in error had wholly failed and refused to allow its name to be used in the continuation of said suit and had wholly failed and refused to sign an appeal bond to the Supreme Court of the United States as principal, in violation of its said agreement, to defendant's damage in the sum of $10,122.55. As a further defense, the answer set up that as security to the said promissory note sued upon plaintiff in error A. J. Daggs had pledged certain shares of water stock, of the reasonable value of four thousand dollars ($4,000); that the defendant in error had failed and refused to account to said plaintiff in error for said certificates of water stock or their value, and had converted the same to its own use, to his damage in the sum of four thousand dollars.

The answer filed by R. E. Daggs in the suit to foreclose the mortgage executed by him was substantially and in effect the
259 same as that filed by his codefendant, A. J. Daggs. Both the answers, that filed by A. J. Daggs and that filed by R. E. Daggs, were verified. To these answers and counter-claims therein set up defendant in error, by way of reply, filed a general denial, which was not verified. Judgement was had for the defendant in error against plaintiff in error A. J. Dagg- for the amount due upon said promissory notes and a decree entered foreclosing the mortgages given to secure the same.

At the outset we are compelled to call attention to the omission of counsel to comply with the statue and the rules of this court on the subject of assignments of error.

These are imperative and must be observed. It is not our business to search the record if perchance we may find reversible error. It is our duty to examine into such alleged errors and only such as are distinctly pointed out in the record. The assignments made by plaintiffs in error in their brief are, for the most part, so general in character and so wanting in definiteness that they cannot be considered. Although defective as assignments, we have, by liberal construction, found that two of them present questions for our review.

The first of these reads as follows:

"The court erred in not giving judgement for plaintiffs in error on their pleas in bar of the recovery of any interest for the reason that the contract with the national bank for ten per cent. interest is *ultra vires*."

What is possible meant by this assignment is that the court erred in allowing under the pleadings defendant in error to recover interest upon the notes sued upon for the reason that a national bank

of this Territory is prohibited from charging a rate of interest
260 in excess of seven per cent. per annum under the limitations imposed by sections 5197 and 5198, Revised Statutes of the United States. The pleadings present this question, and we will therefore consider it as properly assigned. The sections of the Revised Statutes of the United States above referred to read as follows:

"SECTION 5197. Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory or district where the bank is located and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws—the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State or Territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run. And the purchase, discount or sale of a *bona fide* bill of exchange payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange, for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

SECTION 5198. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid or his legal representatives may recover back in an action in the nature of an action of debt twice the amount of the interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established or in any State, county or municipal court in the county or city, in which said association is located, having jurisdiction in similar cases."

By the terms expressed in section 5197, it will be seen that
261 the rate of interest which a national bank may charge is regulated by the provisions of the statutes of the State or Territory where the bank is located upon the general subject of interest. Plaintiffs in error contend that no rate of interest is fixed by the laws of this Territory, and that therefore the provision of section 2197, which reads—

"When no rate is fixed by the laws of the State or Territory or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum"—

limits and restricts the right of a national bank in Arizona to the rate therein provided. The law upon the general subject of interest in this Territory is found in paragraph- 2161 and 2162, Revised Statutes of 1887, which read as follows:

2161. "SEC. 1. When there is no express agreement fixing a different rate of interest, interest shall be allowed at the rate of seven per cent. per annum on all moneys after they become due on any bond, bill, promissory note, or other instrument in writing, or any judgement recovered in any court in this Territery, for money lent for money due on any settlement of accounts from the day on which the balance is ascertained and for money received for the use of another."

2162. "SEC. 2. Parties may agree in writing for the payment of any rate of interest whatever on money due or to become due on any contract; any judgement rendered on such contract shall conform thereto, and shall bear the rate of interest agreed upon by the parties, and which shall be specified in the judgement."

The territorial law, in effect, fixes the rate of interest in the absence of any express agreement upon the subject, but permits the parties to any contract to agree in writing upon any rate whatever. The question presented, therefore, is, Are national banks located in

States or Territories having a statute upon the subject of in-
262 terest which fixes a rate in the absence of an express agreement,

but which likewise permits parties to stipulate in writing for any rate of interest, authorized to contract like other citizens living in such States or Territories? So far as we have been able to find, there are no Federal cases which conclusively adjudicate this question.

In the case of Bank *v.* Johnson, 104 U. S., 271, it was decided that in the State of New York, where the State law fixed the maximum rate of interest at seven per centum and which made any contract usurious which exceeded that rate, a national bank could not discount paper at a greater rate than seven per cent., and thus in effect reserve a greater rate of interest than that allowed by the local law.

In the case of Tiffany *v.* Nat'l Bank, 18 Wall., 409, the Supreme Court held that in the State of Missouri, where by the local law banks of issue organized under the State laws were limited to eight per centum, but the rate of interest allowed generally was ten per centum, a national bank could charge and recover interest at the higher rate allowed to natural persons.

The case of Danforth *et al. v.* Nat'l State Bank, 48 Fed. Rep., 271, was decided upon the statute of New Jersey fixing the legal rate of interest in that State at six per centum per annum. It was there held, following Bank *vs.* Johnson, that the purchase by a national

bank of accepted drafts at a greater discount than lawful
263 interest on their face value came within the prohibition of

section 5197 and was the taking of an unlawful rate of interest under the State law. Since there are no conclusive adjudications upon the precise question under consideration in the Federal courts, we must look to the decisions of the various States and Territories having statutes on the subject of interest similar in their

provisions to that of Arizona. The statutes of the State of California provide that—

"Unless there is an express contract in writing fixing a different rate, interest is payable on all moneys at the rate of seven per cent. per annum." C. C., section 1917.

Construing section 5197, Revised Statutes of the United States, in the light of the local law, the supreme court of that State, in the case of Hines *v.* Marmolejo, 60 Cal., 229, speaking by Ross, J., held that national banks, like natural persons, might charge and collect such rates of interest as might be agreed upon. The learned judge, in writing the opinion, uses this language:

"By the first clause of this section national banks are authorized to charge and receive interest at the rate allowed by the laws of the State or Territory where the bank is located, and, by the last clause when no rate is fixed by the laws of the State or Territory, they are allowed a rate not exceeding seven per centum. Reading the entire section and considering the two clauses together, as they must be considered, we are of the opinion that the word 'fixed' used in the last clause is used in the same sense as the word 'allowed' in the first clause, and that by the words 'the laws of the State or Territory' is meant statute laws. In other words that the true interpretation of the act of Congress is, that in those States and Territories having no statute upon the subject of interest, the national banks are allowed a rate not exceeding seven per centum, while in those States and Territories having a statute on the subject, they
264 are authorized to charge and receive interest at the rate allowed other banks and individuals."

In the case of Rockwell *v.* Farmers' Nat'l Bank, 36 Pac., 905, the Colorado court of appeals held that the law of the State fixing a legal rate of interest, but permitting the parties to agree for any rate of interest, a national bank in that State may charge interest at any agreed rate. To the same effect is the case Bank *v.* Bruhn, 64 Texas, 571.

In the case of Guild *v.* Bank of Deadwood, 57 N. W., 409, the supreme court of South Dakota construed the term "fixed" as used in the clause of section 5197, which reads, "Where no rate is fixed by the laws of the State, Territory, or district," etc., as substantially a repetition of the word "allowed" used in the first clause of the section, and held that a national bank might therefore charge any rate of interest allowed by the local statute to be the subject of contract by natural persons. The Dakota court approves the view taken upon this subject by the supreme court of California in Hines *vs.* Marmolejo, *supra*. In accord with the courts of the State of California, Colorado, Texas, and North Dakota, we have reached the conclusion that a national bank in Arizona is privileged to charge and collect any rate of interest which may be agreed upon, and is as free to act in this regard as are banks organized under local laws or as individuals living in the Territory.

265 The second assignment of error as made by plaintiffs in error reads:

"The court erred in overruling the plaintiffs in error'- motion for judgement on the pleadings for the reason that there was no reply to plaintiffs in error'- verified counter-claims."

The latter part of this assignment would appear to indicate that what is intended is that the court erred in not rendering judgement for the plaintiffs in error for the amounts of the counter-claims pleaded, because they were not denied under oath by the defendant in error in its reply to the amended answers filed by plaintiffs in error.

The general denial made by the defendant in error by way of reply to the counter-claims set up in the answers of the plaintiffs in error was sufficient, although not verified, to put the plaintiffs in error upon proof except as to any matter pleaded therein which by paragraph 735, Revised Statutes, is required to be denied under oath. An examination of the matters pleaded by way of counter-claim in the answers of plaintiffs in error discloses that none of those are matters which are required to be verified by said paragraph, except the allegation contained in the first counter-claim attempted to be set up, founded upon the assignment of the note by P. P. and W. A. Daggs to A. J. Daggs. It is alleged that the note was assigned by the bank to Daggs by an instrument in writing. As to this allegation, possibly under subdivision five of said paragragh 735, under the general denial unverified by the oath of the defendant in error, the assignment should properly be taken as admitted. To warrant a recovery, however, something more than the proof of the
266 assignment of the note to Daggs was needed. While our statutes recognize the right of an assignee to hold the indorser of a non-negotiable chose in action as surety for the payment of the same, no recovery is authorized without it be shown that the assignee had used due diligence to collect the same. Par. 123, 124, R. S.

Again, an examination of this pleading shows that it fails to state a cause of action. A counter-claim must, to be good, contain every allegation which would be needed in a complaint founded on the same cause of action. The only allegations which are made in this counter-claim are that the bank assigned a non-negotiable promissory note, past due, to A. J. Daggs, and that at the time of the assignment the makers were insolvent and were still insolvent, and that the same had not been paid. No allegation is made that due diligence was used, as required by the statute, or that any effort was made to collect the same. This omission in the pleadings is doubly fatal, for the reason that the note appears, from an indorsement upon its face, to have been secured by chattel mortgage of even date therewith. With this endorsement thereon, the mere allegation of the insolvency of the makers of the note was not sufficient to charge the endorser as a surety without an allegation of the exercise of due diligence to collect the same and to enforce the security, and a failure, after such effort, to collect the same. The motion for judgement upon this counter-claim was not only properly denied by the

court below, but had no reply been filed by the defendant in
267 error the facts pleaded were not sufficient to support a judgement thereon. The judgement of the lower court is affirmed.

RICHARD E. SLOAN, *A. J.*

We concur.

WEBSTER STREET, *C. J.*
FLETCHER M. DOAN, *A. J.*
GEO. R. DAVIS, *A. J.*

In the Supreme Court of the Territory of Arizona.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, Respondent,
vs.
A. J. DAGGS & R. E. DAGGS, Defendants, Appellants.
} Assignment of Error.

Come A. J. Daggs and R. E. Daggs, the appellants above named and defendants, and respectfully say that there is manifest error in the record and proceedings in the above-entitled cause, in this, to wit:

I.

The court erred in affirming the judgement of the court below.

268 II.

The court erred in holding that sections 5197 and 5198 of the Revised Statutes of the United States did not apply to the Territory of Arizona, and that where no rate of interest was fixed by the law of the Territory a national bank could charge, receive, and collect on any note or contract any rate of interest they choose or any rate that a natural person could charge by their contract, which sections are as follows:

SECTION 5197. Any association may take, receive, reserve and charge on any loan or discount made, or upon any note bill of exchange or other evidence of debt, interest at the rate allowed by the laws of the State, Territory or district where the bank is located and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate be fixed by the laws of the State or Territory or district, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance reckoning the days for which the note, bill or other evidence of debt has to run. And the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

269 SECTION 5198. "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceeding

section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note bill or other evidence of debt carried with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives may recover back in an action in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same, providing such action is commenced within two years from the time the usurious transaction occurred. (That suits, actions and proceedings against any association under this title may be had *on* any circuit, district or territorial court of the United States held within the district in which such association may be established or in any State, county or municipal court in the county or city in which said association is located having jurisdiction *on* similar cases.)"

The interest law of Arizona and all of its is as follows (page 383, title XXXVIII, interest, (approved March 10, 1887):

2161. (SEC. 1.) "When there is no express agreement fixing a different rate of interest, interest shall be allowed at the rate of seven per cent. per annum on all moneys after they become due on any bond, bill promissory note or other instruments in writing, or any judgement recovered in any court in this Territory, for money lent, for money due on any settlement of accounts from the day on which the balance is ascertained and for money received for the use of another."

2162. (SEC. 2.) "Parties may agree in writing for the payment of any rate of interest whatever on money due or to become due on any contract; any judgement rendered on such contract shall conform thereto, and shall bear the rate of interest agreed upon by the parties, and which shall be specified in the judgement."

III.

The supreme court of Arizona erred in holding that the respondent, The Phœnix National Bank, could charge, collect, and receive ten per cent. interest on the contracts sued on in this cause
270 in Arizona Territory, and that no rate of interest was fixed by the laws of Arizona, and that a national bank could therefore charge and receive, where there was no rate fixed by the law, any rate allowed to be charged by a natural person.

IV.

The court erred in holding that the collection of ten per cent. interest by the Phœnix national bank in Arizona Territory, where no rate of interest is fixed, was within the power of a national bank and was not *ultra vires*.

V.

The court should have held that the charging, collecting, or receiving by respondent of ten per cent. interest on the notes in this

case forfeited its right to collect any interest on said notes in any manner or at all.

V.

The court erred in overruling the appellants' motion for judgement on the pleading, for the reason that the appellants answered by counter-claims:

1st. For a $5,000 non-negotiable promissory note, interest one and one-half per cent.

2nd. An account of $1,045.65.

3rd. Damage claimed for breach of contracts of $10,000.

4th. For the conversion of $4,000 in water stock pledged to the Phœnix national bank as collateral security; all of which said counter-claims and accounts were duly verified and formed a *prima facie* case.

VI.

271 That the court erred in overruling the pleas in abatement to the suits of plaintiff numbered 2555 and 2556, for the reason that said last suits were two suits on the same three promissory notes brought subsequent to suit No. 2554, the plaintiff's first suit being suit No. 2554, the suit now prosecuted here.

VII.

The court erred in not sustaining the appellants' motion for judgement and rendering judgement for appellants, for the reason that the counter-claims of appellant- were duly verified, one of which was a suit on a promissory note, and when the motion for judgement was made and overruled there was no answer of any kind or character by respondents to the said counter-claims, and the case had been closed.

VIII.

The court erred in refusing to hold that the surety, R. E. Daggs, was discharged from his contract of suretyship by the acts of the respondents, for the reason that the respondents had breached their contract with A. J. Daggs, the principal, in refusing to carry on the action of Hugh McCrum *vs.* W. A. and P. P. Daggs, copartners; The Bank of Tempe, defendants; The Phœnix National Bank, intervenor, in the name of the Phœnix national bank, and in refusing to sign the bond on appeal to the Supreme Court of the United States, and in breaching their contract in refusing to pay the fees of the suit of McCrum *vs.* Daggs and W. A. and P. P. Daggs; Phœnix National Bank, intervenor; The Bank of Tempe, defendants, that had accrued prior to Nov. 1st, 1894, and in converting the water stock of $4,000, and in refusing to pay the note of

272 W. A. and P. P. Daggs for the sum of $5,000, assigned to A. J. Daggs by the Phœnix national bank and calculated into the three notes sued on by the respondents as a part of their consideration, the respondents thereby increased the burdens of the surety, and are seeking to recover of the surety the value of

the $4,000 water stock after having converted the same to their own use.

IX.

The court erred in holding R. E. Daggs to be a principal on the note, for the reason that he signed the mortgage, but not the note, and all he had to do with the contract was to give a mortgage on his separate property to secure the debt of A. J. Daggs.

X.

The court erred in not giving judgement for the counter-claims of the appellant-, because the answer set up affirmatively:

1st. Plea in bar to the collection of ten per cent. interest as *ultra vires* on part of the respondents;

2nd. That the $5,000 promissory note assigned to appellant had been counted in at its full face and interest as part of the consideration of the three notes sued on, and, the makers of the same being insolvent, the note was collectable of and from the respondents as assignors; and if the note failed, the consideration for that much of the three notes sued on failed, and neither of appellants ever received any benefit whatever from the $5,000, and that the
273 respondents had prevented any possible hope of collecting it from any property by its breaches of contract to carry on the suit, and negligently and fraudulently refused to allow proceedings in action of McCrum *vs.* W. A. and P. P. Daggs, The Phœnix National Bank, intervenor, to be carried on for its collection; and—

3rd. That respondents had received the benefit of $1,045.65 of appellant's money in carrying on suit for respondents in attemption to collect the said $5,000 note and for the sum of $10,000 for the failure of respondent to carry out the following written agreement:

DEFENDANTS' EXHIBIT 1.

Contract.

It is agreed by and between the Phœnix National Bank and A. J. Daggs, all of Phœnix, Maricopa county, Arizona Territory that for and in consideration of the giving of certain promissory notes aggregating in the sum of nine thousand seven hundred and forty-one and $\frac{73}{100}$ dollars ($9,741.73) dated Nov. 1st, 1894, and signed by A. J. Daggs and secured by mortgage of date November 28th, 1894, on real and personal property described therein, — have sold, assigned and transferred and set over unto the said A. J. Daggs all their right title and interest in and to a certain promissory note signed by W. A. and P. P. Daggs as partners doing business under the firm, name and style of W. A. and P. P. Daggs and W. A. Daggs and P. P. Daggs as individually and for five thousand dollars ($5,000) and secured by first mortgage on 35,000 sheep in Coconino
274 county, Arizona Territory, and given by aforesaid W. A. and P. P. Daggs partners, and W. A. and P. P. Daggs as individuals, to Thos. Armstrong Jr. of Maricopa Co. Arizona Territory and endorsed by the said Thos. Armstrong Jr. and now owned by the

Phœnix National Bank of Phœnix, Arizona Territory, and which said note of $5,000 is dated July 1st, 1893, and bears interest at the rate of 1 % per month payable quarterly and which said nine thousand seven hundred and forty-one and $\frac{73}{100}$ dollars ($9,741.73) note is received in full payment for the said five-thousand-dollars note hereinbefore described.

It is agreed that the said five-thousand-dollar note herein described is now in litigation between the Phœnix National Bank of Phœnix, Arizona Territory and Hugh McCrum of San Francisco, California and the assignee D. A. Abrams as assignee of the Bank of Tempe, Arizona Territory, to establish and determine the priorities of rights under mortgages between the said litigants hereinbefore mentioned which said cause of action and rights of the Phœnix national bank under its first mortgage in said litigation, described is also hereby sold, assigned, transferred and set over unto A. J. Daggs for the above nine thousand seven hundred and forty-one and $\frac{73}{100}$ dollars ($9,741.73).

It is further agreed that the aforesaid cause of action described shall be continued in the name of the Phœnix national bank until this cause is determined and settled, but it is further agreed that from this date Nov. 1st, 1894 A. J. Daggs shall pay the costs that shall hereafter accrue in the said cause.

Dated this 28th day of November, 1894.

275 THE PHŒNIX NATIONAL BANK,
By JAMES A. FLEMING, *President.*

4th. The counter-claim of the conversion of $4,000 water stock, all of which was duly alleged by the amended answer of appellants and proved by competent evidence and was duly verified, and there was no answer or evidence against the $5,000 note nor the $1,045.65 account and no evidence against breach of contract, $10,000 damages, and no defense to the conversion of the $4,000 water stock and collateral security, but respondents said they would return the water stock some time thereafter, and after this all being true the court refused to give any judgement whatever for appellants on any account or at all, but rendered and entertained a judgement for respondents for the full amount of the respondents' claim over the objection of the appellants.

XI.

The court erred in overruling the appellants' motion for judgement and requiring respondents to put in an unverifie- answer to the verified counter-claims of appellant- and allowing respondents to put in some evidence against the breach of contract.

XII.

The court erred in overruling the motion of appellant- to strike out the alleged supplemental complaint of respondent.

XIII.

The court erred in overruling the appellants' demurrer to the respondent's alleged supplementary complaint for the reason alleged in said demurrer.

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XIV.

The court erred in admitting the testimony of respondent and the whole thereof for the reason there was no answer to the counter-claim, and therefore no issue, and no evidence whatever to sustain the supplemental complaint.

XV.

The court erred in admitting the following oral testimony concerning the contents of written instruments, over the objection of appellants, under the notice marked C. H. H., as said notice in nowise shows what instruments are referred to and contains no description of any instrument.

Notice C. H. H. is as follows:

PLAINTIFF'S EXHIBIT C. H. H.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE PHŒNIX NATIONAL BANK, Plaintiff,
vs.
DAGGS ET AL., Defendant-. } 2554, 2555, 2556.

To A. J. Daggs, attorney for defendants:

Please take notice that you are hereby required to produce upon the trial of the above-entitled actions all papers, bills of sale, assignments, promissory notes, letters, and memoranda affecting
277 the issues in the above-entitled actions, or relating to the circumstances thereof, which are in the possession or under the control of yourself or the defendants or any of them, and in default of your producing such papers the plaintiff will introduce parole testimony as to the contents thereof.

L. H. CHALMERS &
EUGENE S. IVES,
Att'y. for Plaintiff.

Under the above notice the court allowed the following evidence, oral, to be introduced:

Mr. L. H. CHALMERS, a witness duly called, sworn according to law, and examined, upon his oath testified as follows:

Examination by Mr. IVES:

Q. Were you the attorney for the Phœnix national bank pending the negotiations resulting in the execution of the notes which are the subject-matter of this action?

Defendants object to the introduction of any further testimony in this case by this witness pertaining to their litigation for the reason that there is no issue between the defendant A. J. Daggs and this plaintiff. Objection overruled by the court, and defendants except.

Mr. IVES: We want to put in evidence the notice to produce papers that I have served on the attorney for the defendants.

By the COURT: Very well.

By the REPORTER: I have forgotten the number of exhibits already offered in this case, but will identify this with my own initials. (Same was thereupon duly admitted and identified as Plaintiff's Exhibit C. H. H.)

278 By Mr. IVES: I have asked that they produce the assignment by the Phœnix national bank to A. J. Daggs of certain notes which, together with the note — has been discussed before your honor, form the consideration for the three notes, the subject-matter of the suit.

The one note which they set out as a counter-claim was a part of the consideration for the three notes which we are suing on. This bill of sale transferred other securities which we have. One note formed all the consideration, and I have asked them to produce the original bill of sale delivered to them at that time, and I now again ask them and they refuse to produce it, and I ask the court to allow plaintiff to prove the contents of it by this witness.

By the COURT: Very well; go ahead.

By Mr. CHALMERS:

A. With respect to the contents of that bill of sale——

(Interruption.) Defendants object to their proving the contents of that notice, because their notice is not a sufficient notice to produce papers as in the case of —— *vs.* ——.

(Counsel for defendants reads authority to the court; whereupon the court overuled the objection, and defendants except.)

By Mr. DAGGS: I object to the introduction of that testimony for the reason that it is secondary evidence and because no notice, as required by law, has been served upon the defendants; further, that there is no issue upon that proposition. We admit that part of the consideration; there is no issue about that part of the consideration. Why, now, are they entitled to produce the evidence before this court?

(Objection overruled, and defendants except to the ruling of the court.)

279 Q. Do you allow any addition, Mr. Chalmers, to the agreement in evidence between the Phœnix national bank and A. J. Daggs with respect to the McCrum matter? Was there any other paper in the nature of a bill of sale or assignment that was delivered by the bank to A. J. Daggs?

WITNESS: Yes, sir. Generally I knew the contents thereof. There was a copy of it made at the same time, and that paper is in my possession.

Plaintiffs offer the same in evidence.

Defendants object to the introduction of the copy, as the original is the best evidence.

By the COURT: Have you it with you?

A. Have.

Q. Allow me to see it.

Continued by the COURT: That calls for three notes—$7,000, $4,000, and $3,000—made by A. J. Daggs to the order of R. E. Daggs. Did you ever see those notes?

A. Yes, sir; when they were in the possession of the Phœnix national bank the endorsement of R. E. Daggs was on them.

Mr. IVES: Certain water rights were given as collateral security for the three notes, subject-matter of this suit?

A. Yes, sir.

Defendants object to the question as leading.

WITNESS: At the time when those notes and mortgages — signed I knew what was the condition of the title to those water rights.

Defendants object to this testimony as immaterial.

280 Objection overruled. Exception taken.

WITNESS: There was litigation affecting them, and the Phœnix national bank was aware of it when it accepted them as collateral security. It took them at this time subject to the knowledge of the litigation.

Defendants object to the testimony as immaterial.

By the COURT: When that was signed and delivered, who got it?

A. That is a part of and cotemporaneous with the assignment that all of this talk has been about. In the settlement—the settlement was a general clean up of all the stuff the Phœnix national bank held against the Daggs, and the bank agreed to give them back everything that they at that time held and took these three notes with the water rights in consideration of it.

The Daggs had previously drawn a contract up where they claimed a guarantee, and I had drawn up this covering all the other notes.

By the COURT: That refers to the other three notes, but not to this $5,000 note?

A. No, sir; it refers to all the other stuff.

By the COURT: Then that exhibit can be admitted and filed in the other case. (Same heretofore identified as C. H. H.)

Mr. IVES: That is all.

Under which said notice it is contended the above testimony was error, and afterwards in the supreme court the respondent under-

281 took and the court allowed to be filed a mass of other testimony under the above said notice; all over the objections and exceptions of the appellants.

XVI.

The court erred in admitting in evidence the mortgage executed by R. E. Daggs, the surety, over the objection of plaintiffs in error, because the same had been mutilated after it had been signed over objection of appellants. This Exhibit F, here copied, shows the mutilation of the instrument after it was signed. There were no pen marks on it before it was signed.

PLAINTIFF'S EXHIBIT F.

Know all men by these presents: that I, R. E. Daggs, mortgagee of Phœnix, county of Maricopa, Territory of Arizona for and in consideration of one dollar and as security for the three promissory notes of A. J. Daggs hereinafter fully set out and for other further valuable consideration to me in hand paid by the Phœnix National Bank of Phœnix, Maricopa county, Arizona, mortgagee have granted sold and conveyed, and by these presents do grant sell and convey unto the said Phœnix national bank all that certain premises described as follows, to wit: The south half of the southeast one-quarter of section fifteen (15) township one (1) south range five (5) east of Gila and Salt River base and meridian, also four water rights in the Consolidated Canal Company represented by certificates number 635, 636, 639 and 640, the northeast quarter (¼) and fifty-three and one-third acres of the northwest quarter (¼) of section nineteen, township one (1) south range five (5) east of Gila and Salt River base and meridian the last-mentioned fifty-three acres being further described as follows:

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Beginning at the northeast corner of said northwest quarter section, thence twenty-six hundred and forty feet south to the southern boundary of said quarter, thence 830 feet east along said southern boundary, thence twenty-six hundred and forty feet along the eastern boundary of said quarter section north to the place of beginning, together with all the water rights and shares appurtenant to said lands all lying within the said county of Maricopa, Territory of Arizona, also all of the north one-half (½) of the southwest quarter (¼) and the south one-half (½) of the northwest quarter (¼) and the northwest quarter of the northwest quarter of section ten (10) township one (1) north range (5) east of Gila and Salt River base and meridian.

NOTE.—Then follows the mutilated portion, which is scratched out with pen, as follows:

[containing in all two hundred acres more or less with all water rights or shares thereunto appurtaining, situate, lying and being in Maricopa county, Arizona Territory with all water rights thereto appertaining.]*

To have and to hold the above-described premises together with all and singular the rights and appurtenances thereto in anywise

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*[Matter enclosed in brackets erased in copy.]

belonging, unto the said The Phœnix National Bank and its heirs and assigns forever.

This conveyance is intended as a mortgage to secure the payment of three certain promissory notes, given by A. J. Daggs of
283 date Nov. 1st, 1894, which said notes are in words and figures following, to wit:

No. —. PHŒNIX, ARIZONA, *Nov. 1st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay to the Phœnix national bank or order, the sum of five thousand dollars in U. S. gold coin with interest thereon, in like gold coin at the rate of ten per cent. per annum from date until paid. Interest payable annually. All payable at Phœnix in Maricopa county, Arizona, and in case suit is brought hereon, I further agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$5,000. A. J. DAGGS.

Due —— —, 189–.

No. —. PHŒNIX, ARIZONA, *Nov. 1st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay to the Phœnix national bank or order the sum of twelve hundred and forty-one $\frac{73}{100}$ dollars in U. S. gold coin with interest thereon in like gold coin at the rate of ten per cent. per annum from date until paid. Interest payable annually. All payable — Phœnix, in Maricopa county, Arizona, and in case suit is brought on this note I agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$1,241.73. A. J. DAGGS.

Due —— —, 189–.

No. —. PHŒNIX, ARIZONA, *Nov. 1st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay to the Phœnix national bank or order the sum of twenty-five hundred dollars in U. S. gold coin with interest thereon in like gold coin at the rate of ten per cent. per annum from date until paid. Interest payable annually. All payable at Phœnix in Maricopa county, Arizona and in case suit is brought on this note, I hereby agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$2,500.00. A. J. DAGGS.

Due —— —, 189–.

And this instrument shall be void if said promissory notes, principal and interest be well and truly paid when due ac-
284 cording to the tenor and effect thereof. But it is distinctly understood and agreed that if the interest on said promissory note, or the principal thereon, shall not be punctually paid when the same shall become due, as in said promissory note mentioned, then,

and in such cases the principal sum and interest thereon, shall be deemed and taken to be wholly due and payable and proceedings may forthwith be had by the said mortgagee The Phœnix National Bank its heirs, executors, administrators, and assigns for the recovery of the same, either by suit on said notes, or on this mortgage and notes; and in any suit or other proceedings that may be had for the recovery of the said principal sum and interest thereon, it shall and may be lawful for the said mortgagee, its heirs, executors administrators, or assigns, to include in the judgement that may be recovered attorneys' fees not exceeding two per cent. thereon, upon the amount found due the plaintiff on said notes and mortgage, or in case of settlement after suit brought, but before judgement rendered, then 1 per cent. on amount found due at the time of settlement, as well as all payments that the said mortgagee, its heirs, executors, administrators, or assigns may be obliged to make for its security, or on account of any taxes charges, encumbrances or assessments whatsoever on the said premises legally laid and made thereon.

Witness my hand this 28th day of November, A. D. 1894.

R. E. DAGGS.

Signed, sealed, and delivered in the presence of—

— —.

285 TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Before me, L. H. Chalmers, a notary public in and for the county of Maricopa, Territory of Arizona, on this day personally appeared R. E. Daggs, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 28th day of November, A. D. 1894.

L. H. CHALMERS,
Notary Public.

XVII.

The court erred in overruling appellants' motion to compel respondents to bring in parties claiming to have interest in property mortgaged in order to clear the title to the property, which motion is as follows:

Motion to Compel Plaintiffs to Bring in Parties.

Cokes the defendant herein and moves the court to compel the plaintiffs to bring in Thompson Walker, P. B. Carley, J. H. L. Guyer, Henry Schmidy, W. H. Nye, and Thomas Argue, parties who claim to have some interest in the property described in plaintiffs' complaint, and that unless the said parties are brought in as parties to this action the title of the property cannot be made clear

and the property will not sell *not* its reasonable value on that
286 account, and asks that they be brought in and be compelled to exhibit their interest in this action.

Filed Oct. 12th, 1896.

XVIII.

The court erred in not rendering judgement according to the pleadings and in not rendering judgement according to the excess of the counter-claim proved by plaintiffs in error.

XIX.

The court erred in holding that the answer of defendants setting up as a counter-claim the note of five thousand dollars ($5,000.00), executed by W. A. and P. P. Daggs and assigned by plaintiff to defendants, did not state facts sufficient to constitute a defense for the reason that no diligence to collect the same was alleged. The reason the court erred is because the answer alleges that the makers of said note are notoriously insolvent, which allegation renders the allegation of diligence unnecessary.

And whereas by the law of the land the said judgement ought to have been given for the said A. J. Daggs and R. E. Daggs, appellants, and against the said The Phœnix National Bank, a corporation, respondent, and the said A. J. Daggs and R. E. Daggs, appellants, pray the judgement aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgement, and that they have judgement in their favor upon the whole case according to their counter-claims and according to the justice and right of the case.

A. J. DAGGS,
Attorney for Plaintiff- in Error.

287 In the Supreme Court of the United States, October Term, A. D. 1897.

THE PHOENIX NATIONAL BANK, a Corporation, Plaintiffs, Respondent,
vs.
A. J. DAGGS & R. E. DAGGS, Defendants, Appellants.
} Appeal and Allowance.

The above-named defendants, A. J. Daggs and R. E. Daggs, appellants, conceiving themselves aggrieved by the order and judgement entered on April 16th, 1898, affirming the judgement of the district court of Maricopa county, Arizona, rendered and entered on the 12th day of November, A. D. 1896, for the principal sum of nine thousand seven hundred and forty-one dollars and $\frac{73}{100}$ ($9,741.73), and for attorney's fees the sum of two hundred and thirty-four and thirty-nine one-hundredths ($234.39) dollars, and for costs and disbursements the sum of ninety-eight and eighty-five hundredths ($98.85) dollars, making in all the sum of twelve thousand and fifty-

two and ninety-four hundredths ($12,052.94) dollars, and that the said sum of nine thousand seven hundred and forty-one and seventy-three hundredths ($9,741.73) dollars bear- interest from date thereof at the rate of ten per cent. per annum, and that the said sum of two thousand three hundred and eleven and twenty-one hundredths ($2,311.21) dollars bear- interest from date hereof at the rate
288 of seven per cent. per annum, and with a foreclosure of plaintiff's mortgage lien upon the lands and water rights covered by the said mortgage as it existed on the 28th day of November, A. D. 1894, in the above-entitled proceedings, doth hereby appeal from said order to the Supreme Court of the United States, and they pray that this their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order and judgement was made, duly authenticated, may be sent to the Supreme Court of the United States.

A. J. DAGGS,
Att'y for Defendants, Appellants,
A. J. Daggs & R. E. Daggs, Phœnix, Arizona.

Phœnix, Arizona Territory, April 23rd, A. D. 1898.

And now, to wit, on June 6th, A. D. 1898, it is ordered that the appeal be allowed as prayed for.

JOSEPH McKENNA,
Justice Supreme Court U. S.

In the Supreme Court of the Territory of Arizona.

THE PHŒNIX NATIONAL BANK, Plaintiff, Respondent, *vs.* A. J. DAGGS & R. E. DAGGS, Defendants, Appellants.	Appeal Bond to Supreme Court U. S.

289 Know all men by these presents that we, A. J. Daggs and R. E. Daggs, as principals, and Wm. M. Billups, as surety, are held and firmly bound unto The Phœnix National Bank, a corporation, respondent, in the full and just sum of $4,000, to be paid to the said Phœnix National Bank, a corporation, or its assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the 25th day of May, in the year of our Lord one thousand and eight hundred and ninety-eight.

Whereas lately, at a session of the supreme court of the Territory of Arizona, in a suit pending in said court between A. J. Daggs and R. E. Daggs and The Phœnix National Bank, a corporation, a final judgement of affirmance was rendered and entered against the said A. J. Daggs and R. E. Daggs, and the said A. J. Daggs and R. E. Daggs having obtained an allowance of appeal and filed a copy thereof in the clerk's office of the said supreme court of the Territory of Arizona to reverse the said judgement in the aforesaid suit,

and a citation directed to the said Phœnix National Bank, a corporation, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 5th day of August, A. D. 1898:

Now, the condition of the above obligation is such that if the said A. J. Daggs and R. E. Daggs shall prosecute said allowance of appeal to effect and answer all damages and costs if they fail
290 to make their said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

A. J. DAGGS.
R. E. DAGGS.
WM. M. BILLUPS.

TERRITORY OF ARIZONA, } *ss:*
County of Maricopa, }

Wm. M. Billups, being duly sworn, on oath says that he is a resident householder and freeholder in Maricopa county, Arizona; that he is worth the sum for which he has become liable on said bond over and above all just debts and liabilities, exclusive of property exempt from execution.

WM. M. BILLUPS.

[SEAL.] Subscribed and sworn to before me this 25th day of May, A. D. 1898.

R. E. DAGGS,
Notary Public.

My commission expires April 8th, 1902.

The above and foregoing bond is this day approved by me, this the 18th day of June, A. D. 1898.

JOSEPH McKENNA,
Justice of Supreme Court of U. S.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Phœnix National Bank, a corporation, Greeting:

291 You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on or before the fifth day of August, A. D. 1898, pursuant to an appeal filed in the clerk's office of the supreme court of the Territory of Arizona, wherein A. J. Daggs and R. E. Daggs are appellants and you are respondent, to show cause, if any there be, why the said judgement rendered against the said appellants, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 6th day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

JOSEPH McKENNA,
Justice of Supreme Court of the U. S.

Proof of Service of Citation.

On this 30th day of June, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared before me the subscriber and makes oath that he delivered a true copy of the within citation to C. J. Hall, vice-president of the Phœnix national bank.

Sworn to and subscribed the 30th day of June, A. D. 1898.

JOE M. BALSZ.

[SEAL.] LLOYD JOHNSTON,
Clerk of Supreme Court.

292 In the Supreme Court of the Territory of Arizona.

THE PHŒNIX NATIONAL BANK, a Corporation, Respondent,
vs.
A. J. DAGGS & R. E. DAGGS, Appellants. } Supersedeas.

TERRITORY OF ARIZONA, } *ss:*
County of Maricopa, }

Having considered the appellants' petition for an allowance of appeal to the Supreme Court of the United States, and it appearing on inspection of said case that a Federal question is involved, and it appearing, by affidavit before me, that the amount involved in said case is more than the sum of five thousand dollars, exclusive of interest and costs, and that said case being for the foreclosure of a mortgage lien upon ample and sufficient property to satisfy the judgement and all costs, and that the said property necessarily follows the suit, and said appeal having been allowed as prayed for in said allowance of appeal, and a supersedeas bond in the sum of four thousand dollars having been presented and approved by the undersigned, it is ordered that all proceedings on said judgement in said case shall be stayed until the proceedings on said appeal
293 in said cause shall be determined by the Supreme Court of the United States, and any remittitures heretofore issued shall be forthwith returned, with all record papers, to the supreme court of Arizona.

JOSEPH McKENNA,
Justice Supreme Court of the U. S.

June 18th, A. D. 1898.

294 Supreme Court.

TERRITORY OF ARIZONA, *ss:*

I, Lloyd Johnston, clerk of the supreme court of the Territory of Arizona, do hereby certify the foregoing to be a full, true, and correct copy of the transcript of record in the case of R. E. Daggs and A. J. Daggs, plaintiffs in error, *vs.* Phœnix National Bank, a corpo-

ration, defendants in error. I further certify that I have made a full, true, and correct copy of all papers filed therein and a full, true, and correct copy of all minute entries of the orders, opinions, and proceedings in said cause, and that the citation hereto annexed is the original citation.

In witness whereof I have hereunto set my hand and affixed the official seal of said supreme court of Arizona this 29th day of July, A. D. 1898, at Phœnix, the capital of Arizona Territory.

[Seal Supreme Court of Arizona.]

LLOYD JOHNSTON,
Clerk of the Supreme Court of the Territory of Arizona.

295 In the Supreme Court of the Territory of Arizona.

R. E. DAGGS and A. J. DAGGS, Plaintiffs in Error,
vs.
THE PHŒNIX NATIONAL BANK, a Corporation, Defendant in Error.

To the Phœnix National Bank and L. H. Chalmers, its attorney of record:

Take notice that above-named plaintiffs in error will present the original "statement of fact" and "objections and exceptions to admissions and rejection of evidence," as shown by the record, a copy of which is herewith served on you, to the court in this cause on June 1st, A. D. 1899, at 10 o'clock a. m. of that day, or as soon thereafter as counsel can be heard, and will there move the court to sign and certify same and for order allowing same to be filed *nunc pro tunc* as of date April 16th, 1898, the date of rendition of judgment by this court in this case.

A. J. DAGGS,
Attorney for Plaintiffs in Error.

(Endorsed:) No. 622. In supreme court of Ter. of Arizona. A. J. Daggs, R. E. Daggs, pl'ts in error, *vs.* The Phœnix National Bank, a corporation, def'ts in error. Notice. Rec. service within notice this May 29, 1899. L. H. Chalmers, att'y for def't in error. Filed May 31st, 1899. Lloyd Johnston, clerk.

296 In the Supreme Court of the Territory of Arizona.

R. E. DAGGS and A. J. DAGGS, Appellants and Plaintiffs in Error,
vs.
THE PHŒNIX NATIONAL BANK, a Corporation, Appellee and Defendants in Error.

Comes all the appellants, by their attorney, A. J. Daggs, and moves the court to sign and certify the "statement of facts" and "objections and exceptions to admissions and rejection of evidence" in this cause, as shown by the record, and order the same to be filed

by the clerk of this court *nunc pro tunc* as of date April 16th, A. D. 1898, the day of rendition of judgment by this court in this cause.

A. J. DAGGS,
Attorney for Appellants.

(Endorsed:) No. 622. In supreme court of Ter. of Arizona. A. J. Daggs, R. E. Daggs, pl't'fs in error, *vs.* The Phœnix National Bank, a corporation, def't in error. Motion to court to sign & file statement of facts and objection & exception to evidence. Rec. service copy within motion this May 29, 1899. L. H. Chalmers, att'y for def't in error. Filed May 31st, 1899. Lloyd Johnston, clerk.

297 In the Supreme Court of the Territory of Arizona.

R. E. DAGGS ET AL., Plaintiffs in Error,
vs.
PHŒNIX NATIONAL BANK, a Corporation, Defendant in Error.
} No. 622. Minute Entry, June 2nd, 1899.

In this cause it is ordered that the motion for the court to sign and file statement of facts filed herein by plaintiffs in error be submitted.

298 In the Supreme Court of the Territory of Arizona, January Term, 1898.

R. E. DAGGS and A. J. DAGGS, Plaintiffs in Error,
vs.
THE PHŒNIX NATIONAL BANK, a Corporation, Defendant in Error.
} No. 622.

Statement of Facts in the Nature of a Special Verdict.

We do hereby make and certify the following to be a statement of facts in the above-entitled cause:

This cause came into the supreme court of the Territory of Arizona on a writ of error to the January term, 1898, under the provisions of act No. 71 of the Nineteenth Legislative Assembly of the Territory of Arizona, which act is as follows, to wit:

"No. 71.

"An act relating to appeals and writs of error from the district and circuit courts of the Territory of Arizona to the supreme court.

"Be it enacted by the Legislative Assembly of the Territory of Arizona:

"SECTION 1. Whenever an appeal or writ of error is taken from any district or circuit court of this Territory to the supreme court of the Territory the appellant or plaintiff in error, as the case may be, may have the testimony taken in the case transcribed and certified by the court reporter, and file the same with the papers in the case, and thereupon it shall become and be a part of the record in said cause.

"SEC. 2. The clerk of the district or circuit court, as the case may be, when an appeal or writ of error is taken from said court to the supreme court of the Territory, shall certify and transmit the entire record, including the original papers on file in his court, and all minutes orders in the case, to the supreme court of the
299 Territory, and it shall not be necessary for the plaintiff in error or appellant to file with the supreme court any transcript, assignment of errors or other papers except as herein provided.

"SEC. 3. The plaintiff in error or appellant, as the case may be, shall make and print or typewrite an abstract of the record so certified by the clerk of the district or circuit court which shall consist of a succinct statement of the record of the court below and shall be numbered throughout by folios on the outer margin of the page. Six copies of the printed or typewritten abstract of the case shall be filed in the supreme court on or before the first day of the term at which the appeal or writ of error is returnable and at least two copies served on the opposite party.

"SEC. 4. Each party shall prepare and print or typewrite an argument of the points and authorities relied on. The briefs of both sides shall begin with a succinct statement of so much of the record as is essential to the questions discussed in them referring to the printed abstract by folios and sufficient to dispense with the reading of the printed abstract on the argument. The brief of the plaintiff in error or appellant shall also next contain a distinct enumeration in the form of propositions of the several errors relied on, and all errors not assigned in the printed brief shall be deemed to have been waived. It shall not be necessary to assign or file any assignment of errors in the court below or supreme court, except those assigned in the brief of the plaintiff in error or appellant.

"SEC. 5. All rulings made by the court below in opposition to the plaintiff in error or appellant shall be taken as excepted to by the party appealing or suing out the writ of error, and when assigned as error in the brief shall be reviewed by the supreme court without any bill of exception or other assignment of errors except as herein provided.

"SEC. 6. Abstracts or record and briefs shall be neatly and legibly printed with black ink or typewritten on white writing
300 paper, properly paged at the top, with a margin on the outer edge of the page of an inch and a half. The printed page shall be seven inches long, and three and a half inches wide, and the paper shall not be more than nine inches long or seven inches wide. Each abstract of record and brief shall be signed by counsel preparing it; and shall be stitched together in a paper or cloth cover, with the proper designation and the title of the cause printed or typewritten on the outside.

"SEC. 7. The clerk of the supreme court shall retain all appeal papers until fifteen days after the decision or other final disposition of the appeal in the supreme court, and every motion for a rehearing shall be filed within said fifteen days after such decision.

If no motion for a rehearing be then made the clerk of the supreme court shall remit the appeal papers to the court below with a copy of the decision rendered in said cause if any has been then made and filed. If no opinion has been made and filed he shall remit the appeal papers without such decision, and as soon thereafter as the decision is made and filed in the supreme court he shall forthwith thereafter remit a copy of the same to the court below. If a motion for a rehearing be filed within the time above mentioned the clerk shall retain the appeal papers until the disposition of such motions.

"SEC. 8. All acts and parts of acts in conflict with this act are hereby repealed.

"SEC. 9. This act shall take effect and be in force from and after its passage.

"D. G. CHALMERS, *Speaker.*
"FRED G. HUGHES, *President.*

"Approved March eighteenth, 1897.
"B. J. FRANKLIN, *Governor.*"

There were filed with the writ of error in this court the original papers from the district court and the transcript of the reporter's notes of the evidence taken at the trial. There was no bill of exceptions nor statement of facts from the district court. The judgment of the district court, as appears from the original
301 papers, was as follows, to wit:

"In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

"THE PHŒNIX NATIONAL BANK, Plaintiff,
vs.
"A. J. DAGGS, R. E. DAGGS, JAMES C. GOODWIN, and Benjamin Goldman, Defendants.
} Being Actions Nos. 2554, 2555, 2556.

"*Judgment of Foreclosure and Sale.*

"The cause of The Phœnix National Bank against A. J. Daggs and R. E. Daggs, being the cause numbered 2554 in this court, having come on for trial on the 12 day of October, 1896, without a jury, Honorable A. C. Baker presiding, the plaintiff appearing by L. H. Chalmers, Esq., its attorney, and the defendants appearing by A. J. Daggs, Esq., their attorney, and the plaintiff having introduced testimony to sustain the allegations of its complaint, and the defendants having introduced testimony in opposition thereto, and the cause of The Phœnix National Bank against A. J. Daggs, R. E. Daggs, Benjamin Goldman, and James C. Goodwin, being No. 2555, being at issue as to the defendants A. J. Daggs and R. E. Daggs, and the defendants Goodwin and Goldman having interposed an answer by their attorneys, Fitch & Campbell, and the plaintiff having demurred to the said answer of the defendants Goodwin and Goldman, and said demurrer having been sustained, and no further

pleadings having been filed by the said last-named defendants, and the cause of The Phœnix National Bank against A. J. Daggs, numbered 2556, being also at issue, and a stipulation having been made in open court consolidating said three actions, and further testimony having been introduced, and the court being fully and sufficiently advised in the premises—

"Now, upon the pleadings and proceedings in the said three actions, on motion of L. H. Chalmers, Esq., for plaintiff—

"It is ordered, adjudged, and decreed that the plaintiff
302 have and recover of defendant A. J. Daggs, for principal, the sum of nine thousand seven hundred and forty-one and $\frac{73}{100}$ dollars, and for interest on the same to date of judgment the sum of one thousand nine hundred and seventy-seven and $\frac{97}{100}$ dollars, and for attorneys' fees the sum of two hundred and thirty-four and $\frac{39}{100}$ dollars, and for costs and disbursements the sum of ninety-eight dollars and $\frac{85}{100}$ ($98.85), making in all the sum of twelve thousand and fifty-two and $\frac{94}{100}$ dollars, and that the said sum of nine thousand seven hundred and forty-one and $\frac{73}{100}$ dollars bear interest from the date hereof at the rate of ten (10 %) per cent. per annum.

"It is further ordered, adjudged, and decreed that the mortgage liens of the plaintiff, as set out in the complaints, as they existed on the 28th day of November, 1894, upon the following-described land and premises and water rights, be, and they are hereby, foreclosed:

"The south one-half of the southeast one-quarter of section fifteen (15), township one (1) south, range five (5) east, of the Gila and Salt River base and meridian; also four (4) water rights in the Consolidated Canal Company, represented by certificates numbers 635, 636, 639, and 640; also the northeast quarter (¼) and fifty-three and one-third acres of the northwest quarter of section nineteen (19), township one (1) south, range five (5) east, of the Gila and Salt River base and meridian, the last-mentioned fifty-three (53) acres being further described as follows: Beginning at the northeast corner of said northwest quarter section, running thence 830 feet west along the north line of said section; thence twenty-six hundred and forty feet south to the southern boundary of said quarter; thence 830 feet east along said southern boundary; thence twenty-six hundred and forty feet along the eastern boundary of said quarter section north to the place of beginning, together with all the water rights and shares appurte-
303 nant to said lands, all lying within the said county of Maricopa, Territory of Arizona; also all of the north one-half (½) of the southwest one-quarter (¼) and the south one-half (½) of the northwest one-quarter (¼) and the northwest one quarter (¼) of the northwest one-quarter (¼) of section (10) ten, township one (1) north, range five (5) east, of Gila and Salt River base and meridian, all in the county of Maricopa and Territory of Arizona, with all water rights thereto appertaining.

"The southwest one-quarter (¼) of section twenty-two (22), township one (1) south, of range four (4) east, Gila and Salt River base and meridian, containing, according to survey, one hundred and sixty acres, being, lying, and situate in Maricopa county, Arizona

Territory; also the northwest one-quater (¼) of section nineteen (1–), in township one (1) south, of range five (5) east, of the Gila and Salt River base and meridian, except, however, the following-described portion: Beginning at the northeast corner of said one-quarter (¼) section, thence running west 830 feet along the north line of said one-quarter (¼) section; thence south 2,640 feet to the south line of said quarter (¼) section; thence east 830 feet along the south line of said one-quarter (¼) section to the center of said section nineteen (19); thence north along the east line of said one-quarter (¼) section 2,640 feet to place of beginning, and being a strip off the east side of said one-quarter (¼) section, containing fifty-one and $\frac{53}{100}$ (51.53) acres of land, being, lying, and situate in Maricopa county, Arizona Territory.

"Lots number- one (1) and two (2) of block number fifty-one (51) of the town of Tempe, Maricopa county, Territory of Arizona, with all the appurtenances thereunto belonging.

"It is further ordered, adjudged, and decreed that the clerk of this court issue an order of sale directed to the sheriff of Maricopa county, commanding him to seize and sell the above-described land, premises, and water rights, or so much thereof as may be necessary, as under execution, and that after deducting the amount of his fees and expenses of such sale and all accruing costs and any lien
304 or liens upon said premises so sold at the date of such sale for taxes or assessments, and after paying to the plaintiff, as hereinafter provided, the amount paid by it for or on account of taxes, to apply the proceeds thereof to the judgment and satisfaction of the said sum of twelve thousand and fifty-two and $\frac{94}{100}$ dollars, with interest upon the said principal sum of nine thousand seven hundred and forty-one and $\frac{73}{100}$ dollars at the rate of ten (10 %) per centum per annum, and with interest upon the sum of two thousand three hundred and eleven and $\frac{21}{100}$ dollars at the rate of seven (7 %) per centum per annum.

"And if the said lands, premises, and water rights shall sell for more than sufficient to pay off said sums of money, then commanding the said sheriff to pay over the excess to the clerk of this court to the credit of this action, subject to the further order of the court, but if the said lands, premises, and water rights cannot be found, or if the proceeds of such sale shall be insufficient to satisfy said judgment, then commanding the said sheriff to make the money or any balance thereof remaining unpaid out of any other property of the defendant A. J. Daggs as under ordinary execution.

"It is further ordered, adjudged, and decreed that before applying the proceeds of the sale of the lands, premises, and water rights described in the complaint in action No. 2554 to the satisfaction of the amount awarded to the plaintiff, the sheriff pay to the plaintiff the sum of thirteen and $\frac{3}{100}$ dollars, with interest from the 8th day of July, 1896, at the rate of seven (7 %) — per annum, and that before applying the proceeds of the sale of the lands and premises described in the complaint in action No. 2555 to the satisfaction of the amount awarded to the plaintiff, the sheriff pay to the plaintiff the sum of one hundred and ten and $\frac{52}{100}$ ($110.52) dollars, with interest thereon

from the 8th day of July, 1896, at the rate of seven (7%) per centum per annum; which said principal sums were paid by the plaintiff for and — account of taxes.

"It is further ordered, adjudged, and decreed that the
305 defendants Benjamin Goldman and James C. Goodwin take nothing by reason of their claims herein, and that the defendants and each and every of them, and all persons claiming or to claim from or under them or any or either of them, and all persons having liens subsequent to the mortgages described in the complaints by judgment or decree upon the lands described in the said mortgages, and all persons having any liens by or under such subsequent judgment or decree, and their heirs or personal representatives, and all persons claiming under them, and all persons claiming to have claim of estate or interest in the premises subsequent to the filing of the notice of the pendency of any of the three actions herein mentioned be forever barred and foreclosed of all and every equity of redemption or claim in, of, or to the said mortgaged premises and every part and parcel thereof from and after the delivery of the sheriff's deed on the sale thereof.

"It is further ordered, adjudged, and decreed that the plaintiff may be a purchaser at the sheriff's sale of said land, premises, and water rights, and that the purchaser or purchasers of said mortgaged premises or water rights at said sheriff's sale be let into possession thereof, and that any of the parties to this action who may be in possession of the said land, premises, or water rights, or any part thereof, or any person who since the commencement of this action has come into possession, or either of them, shall deliver possession thereof to said purchaser or purchasers on the production of the sheriff's deed for said land, premises, and water rights or any part thereof.

"Done in open court this 12th day of November, 1896.

"A. C. BAKER, *Judge.*"

The assignments of error were contained in the brief of the plaintiff- in error and are as follows, to wit:

"*Assignment of Error.*

"The court erred in not giving judgment for plaintiff- in
306 error on their pleas in bar (see R. E. Daggs' answer, Original Abstract, folio- 26 to 28, and A. J. Daggs' answer, Supplemental Abstract, folio- 2 to 4) of the recovery of any interest, for the reason that the contract with the nat. bank for 10 % interest is *ultra vires.*

II.

"The court erred in overruling the plaintiff- — error'- motion for judgment on the pleadings (folio- 203 to 204, Original Abstract), for the reason that there was no reply to plaintiffs in error'- verified counter-claims (folios 4 to 17, Supplemental Abstract).

III.

"The court erred in permitting the defendant in error to file a general denial without being verified (folio 42, Original Abstract).

IV.

"The court erred in proceeding with the trial and receiving evidence under a verified answer of the defendant in error (folio- 23, 24, and 25, Supplemental Abstract).

V.

"The court erred in overruling plaintiffs in error's motion to compel defendants in error to bring in parties claiming to have interest in property mortgaged (folio 202, Original Abstract).

VI.

"Because the court erred in permitting the introduction of oral testimony by defendants in error to prove the contents of written instruments alleged to be in the possession of plaintiffs in error under the notice marked C. H. H. (folio- 82 and 83, Sup. Abstract).

VII.

"The court erred in admitting in evidence the mortgage executed by R. E. Daggs, the surety (Ex. F, folio 70, Sup. Abstract), over the objection of plaintiffs in error, because the same had been mutilated after it had been signed (folio 210, Original Abstract).

307 VIII.

"The court erred in rendering judgment against R. E. Daggs, the surety, for the reason that as such surety he was discharged by the acts of the defendant in error.

IX.

"The court erred in ignoring the counter-claims by his judgment (folio 310, Original Abstract).

X.

"The court erred in not rendering judgment for the full amount of the plaintiffs in error'- counter-claims (folio- 29 to 38, Original Abstract) (folio- 5 to 14, Sup. Ab.).

XI.

"The court erred in not rendering judgment according to the pleadings and in not rendering judgment according to the excess of the counter-claim proved by plaintiffs in error."

Under the assignments of error thus made and presented in the record this court could and did make no determination of the facts of the case, except such as appeared in the pleadings and judgment,

for the reason that such of the assignments as were sufficient in form to raise any question presented none for our consideration which necessitated the further finding of facts in the case. We are unable to determine from the record presented in this court, in the absence of a bill of exceptions and a statement of facts, what the facts were which were put in evidence on the trial in the court below, further than as they are shown by the transcript of the reporter's notes, and from such review of the record the judgment of the district court was affirmed as follows:

"In the Supreme Court of the Territory of Arizona.

"R. E. DAGGS and A. J. DAGGS, Plaintiffs in Error,
vs.
PHŒNIX NATIONAL BANK, a Corporation, Defendants in Error.

308 "This cause having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that the judgment of the district court herein be, and the same is hereby, affirmed.

"It is further ordered and adjudged that the defendant in error herein do have and recover of and from the plaintiffs in error, R. E. Daggs and A. J. Daggs, as principals, and R. F. Doll, W. M. Billups, and the London Company, as sureties, on cost bond its costs in this court, taxed at forty-three and $\frac{10}{100}$ ($43.10) dollars."

By the court:

WEBSTER STREET, *C. J.*
RICHARD E. SLOAN, *A. J.*
FLETCHER M. DOAN, *C. J.*
GEO. R. DAVIS, *A. J.*

Dated November 1st, 1899.

(Endorsed:) No. 622. In the supreme court of the Territory of Arizona. R. E. Daggs *et al. vs.* Phœnix Nat'l Bank. Statement of facts. Filed Nov. 2nd, 1899. Lloyd Johnston, clerk, by Angie B. Parker, deputy.

309 In the Supreme Court of Arizona, Oct. Term, 1899.

R. E. DAGGS, A. J. DAGGS, Appellant-,
vs.
THE PHŒNIX NATIONAL BANK, Appellee.

Comes R. E. Daggs and A. J. Daggs and files *this* their exceptions and objections to the so-called "statement of facts in the nature of a special verdict" on the following grounds:

1st.

Because said statement is not a statement of facts and is not based on the evidence in the case.

2nd.

Because said statement is not a compliance with section 1868, R. S. U. S., and the amendment of April 7th, 1874.

3rd.

Because the court refused to make a statement of facts or to make and certify to the rulings on the evidence or to pass on the motion to have the same made, certified, and filed *nunc pro tunc*, and refused to adopt the statement and objections and exceptions to evidence as prepared by appellants and tended the court, which appellants now again herewith tender and ask to have the same adopted and filed as a part of this record.

4th.

Because the full record of the evidence containing all the evidence was on file in this court as a part of the record in this case, and the court refused to make a statement of facts in the case from such record or in accordance with such record or to adopt those prepared and herewith again tendered and filed as part of the record in this case.

5th.

Because the assignment of error set out in said finding is not the assignment of error set out in appellants' brief, as it purports to be.

Dated this 1st day of November, 1899.

R. E. DAGGS.
A. J. DAGGS, *Pro Se.*

(Endorsed:) No. 622. In the supreme court of Arizona. R. E. Daggs & A. J. Daggs, appellant-, *vs.* The Phœnix National Bank. Exceptions to statement — facts. Filed Nov. 7th, 1899. Lloyd Johnston, clerk, by Angie B. Parker, deputy.

310 In the Supreme Court of the Territory of Arizona.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, Appellee, Defendant in Error,
vs.
A. J. DAGGS, R. E. DAGGS, Defendants, Appellants, Plaintiff-in Error.

Statement of Facts.

The court finds the facts in the above-entitled cause to be as follows:

I.

That defendant in error, The Phœnix National Bank, is a national banking corporation doing business in Phœnix, Arizona Territory, under the national banking laws of the United States.

II.

That on Nov. 1st, 1894, defendant A. J. Daggs executed and delivered to the Phœnix national bank his three certain promissory notes for the sum of $9,741.73, with interest, at 10 per cent. per annum, from date of execution until paid, and to secure the payment of said notes on Nov. 28th, 1894, the said A. J. Daggs executed and delivered his two certain real-estate mortgages upon the property described in the mortgages of A. J. Daggs set out in complaint of the Phœnix national bank.

III.

In order to further secure the payment of said notes, the defendant R. E. Daggs, on Nov. 28th, A. D. 1894, executed and delivered to the Phœnix national bank a mortgage on his separate property, as described in the mortgage of R. E. Daggs set out in plaintiff's complaint, but received no part of the consideration of the three notes sued on.

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IV.

That all three of said mortgages were filed for record by the Phœnix national bank in the office of the county recorder of Maricopa county, Arizona Territory, and recorded.

V.

That on the 21st day of Feb'y, A. D. 1896, the date of bringing this action, the principal and interest on said notes were wholly due and unpaid.

VI.

That said notes provided for 2 per cent. attorney fees for the amount found due on said notes.

VII.

That the Phœnix national bank paid out for taxes on the property covered by its mortgages the sum of one hundred and twenty-three and $\frac{53}{100}$ ($123.53) dollars.

VIII.

That no rate of interest is fixed by the laws of Arizona Territory on any contract, but parties may agree in writing for any rate of interest on any contract.

IX.

That in consideration for the giving of the three promissory notes sued on the Phœnix national bank sold, assigned, and delivered to defendant A. J. Daggs that certain non-negotiable promissory note dated Phœnix, Arizona, on July 1st, 1893, for the sum of $5,000, interest 1¼ per cent. per month, payable to Thomas Armstrong, Jr., due ninety days after date, with 10 per cent. attorneys' fees if collected by suit, and signed by W. A. and P. P. Daggs and W. A. Daggs

and P. P. Daggs, endorsed by Thomas Armstrong, Jr., and said $5,000 note is wholly due and unpaid except interest on same to April 2nd, 1894.

X.

That no credit has been given on the notes sued on for the amount of the five-thousand-dollar note and interest thereon, although defendant in error has been often requested to do so by defendant A. J. Daggs.

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XI.

That the consideration of the three promissory notes sued on was the five-thousand-dollar note aforesaid executed by W. A. and P. P. Daggs and W. A. Daggs and P. P. Daggs, of date July 1st, 1893, together with the interest due thereon up to Nov. 28th, 1894, together with other contracts.

XII.

That said five-thousand-dollar note was sold and assigned by the Phœnix national bank by an instrument in writing signed by it, as was also a chattel mortgage given to secure the payment of the same.

XIII.

That at the date of the sale and assignment of said note and chattel mortgage the property covered by said chattel was in litigation between the Phœnix national bank and one Hugh McCrum to determine the priority of chattel-mortgage liens.

XIV.

That at the time of the sale and assignment of the said five-thousand-dollar note and chattel mortgage it was agreed between the Phœnix national bank and defendant A. J. Daggs that the litigation between the Phœnix national bank and Hugh McCrum should be continued in the name of the Phœnix national bank to court of last resort and final determination, but that said defendant, A. J. Daggs, should pay all costs that should accrue after Nov. 1st, 1894, and that the Phœnix national bank should pay all costs accruing prior thereto.

XV.

That said litigation terminated in favor of Hugh McCrum in the supreme court of Arizona, and no part of the chattel mortgaged property was recovered by the Phœnix national bank.

XVI.

That defendant A. J. Daggs, pursuant to the contract, procured an appeal allowed to the Supreme Court of the United States, but the Phœnix national bank refused to sign a bond on appeal as principal or allow its name to be used on said bond on
313 appeal or to allow its name to be used in carrying on said suit.

XVII.

That defendant A. J. Daggs paid out and expended by virtue of the agreement to carry on the litigation between McCrum and the Phœnix national bank the sum of $545, cost.

XVIII.

That at the date of the sale and assignment of the said $5,000 note to A. J. Daggs the makers of said $5,000 note were actually and notoriously insolvent and had no property out of which an execution could be satisfied, which was well known to the Phœnix national bank.

XIX.

That at the date of the execution of the notes sued on A. J. Daggs delivered, as collateral security to the said notes, to the Phœnix national bank certificate of one whole share of water stock in the Tempe irrigation canal, and certificate of one whole and one half shares of water stock in the Western branch of the Tempe irrigation canal, and certificate of one whole share and one half share in the Southern branch of the Tempe irrigating canal, and which said shares of stock are of the value of four thousand ($4,000) dollars.

XX.

That the Phœnix national bank refused to give A. J. Daggs certificate showing that he was the owner of the said water stock, and that the Phœnix national bank held said stock as collateral security only, and refused to recognize the defendant as having any interest in the said water stock whatever or to allow defendant to exercise their rights as stockholders in the Tempe irrigation canal by virtue of said stock.

(Endorsed:) No. 622. In supreme court of the Territory of Arizona. The Phœnix National Bank, a corporation, pl't'f, defendant in error, *vs.* A. J. Daggs, R. E. Daggs, defendants, plaintiff in error. Statement of facts. Rec. service copy within statement — facts this May 29, 1899. L. H. Chalmers, att'y for def't in error. Filed Nov. 2nd, 1899. Lloyd Johnston, clerk, by Angie B. Parker, deputy.

314 In the Supreme Court of the Territory of Arizona.

R. E. DAGGS and A. J. DAGGS, Plaintiffs in Error,
vs.
THE PHŒNIX NATIONAL BANK, a Corporation, Defendant in Error.

"*Objections and Exceptions to Admission and Rejection of Evidence.*"

Be it remembered that, etc.

This action, filed Feb'y 21st, 1896, come on regularly to be heard before the court, Hon. A. C. Baker, setting without a jury. On Oc-

tober the 12th, 1896, the following evidence was offered before the court on part of The Phœnix National Bank, defendant in error, and admitted over the objection and exception of the plaintiff- in error at the time:

I.

The defendant in error, The Phœnix National Bank, offered in evidence the mortgage given to secure the three notes sued on; to the introduction of which mortgage the plaintiff- in error at that time made the following objection: "Defendant (Daggs) objects to the introduction of the mortgage on the grounds that it has been mutilated after it has been signed." Objection overruled. Defendant- except. Same was duly admitted and marked Plaintiff's Exhibit F.

Which said mortgage of surety, R. E. Daggs, before it was signed, was free from pen scratches, but after it was signed and delivered to the Phœnix national bank three lines were scratched out with a pen, as shown in the following copy:

Know all men by these presents, that I, R. E. Daggs, mortgagee of Phœnix, county of Maricopa, Territory of Arizona, for and in consideration of one dollar and as security for three promissory notes of A. J. Daggs hereinafter fully set out, and for other valuable considerations to me in hand paid by the Phœnix
315 National Bank of Phœnix Maricopa county Arizona, mortgagee, have granted, sold and conveyed, and by these presents, do grant, sell and convey, unto the said Phœnix national bank all that certain premises described as follows, to wit: The south half of the southeast quarter of section 15, township one, south range five east of Gila and Salt River base and meridian, also four water rights in the Consolidated Canal Company represented by certificates number- 835, 636, 639, and 640, also the northeast quarter and fifty-three and one-fifth acres of the northwest quarter of section nineteen, township one south range five east of Gila and Salt River base and meridian, the last-mentioned fifty-three acres being further described as follows: Beginning at the northeast corner of said northwest quarter section, thence twenty-six hundred and firty feet south to the southern boundary, of said quarter, thence eight hundred and thirty feet east along said southern boundary, thence twenty-six hundred and forty feet along the eastern boundary of said quarter section north to the place of beginning, together with all water rights and shares appurtenant to said lands all lying within said county of Maricopa Territory of Arizona, also all the north one-half of the southwest quarter and the south one-half (½) of the northwest quarter (¼) and the northwest quarter (¼) of the northwest quarter (¼) of section (10) ten, township (1) one, north range — (5) east of Gila and Salt River base and meridian.

(NOTE.—Then follows the mutilated portion, which is scratched out with pen, as follows:)

[containing in all two hundred acres more or less with all water rights or shares thereunto appurtaining, situate lying and being in

Maricopa county, Arizona Territory, with all water rights thereto]* appertaining.

To have and to hold the above-described premises together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said Phœnix national bank and its heirs and assigns forever.

316 This conveyance is intended as a mortgage to secure the payment of three certain promissory notes, given by A. J. Daggs of date of November 1st, 1894, which said notes are in words and figures as follows, to wit:

No. —. PHŒNIX, ARIZONA, *Nov. 1st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay the Phœnix national bank or order the sum of six thousand dollars in United S. gold coin, with interest thereon in like gold coin at the rate of 10 per cent. per annum from date until paid. Interest payable annually. All payments at Phœnix, Maricopa county, Arizona, and in case suit is brought hereon, I further agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$5,000.00. A. J. DAGGS.

Due —— —, 189–.

No. —. PHŒNIX, ARIZONA, *Nov. 1st*, 1894.

On or before one year after date, without grace, for value received, I promise to pay the Phœnix national bank or order, the sum of twelve hundred and forty-one $\frac{73}{100}$ dollars in U. S. gold coin, with interest thereon in like gold coin at the rate of 10 per cent. per annum from date until paid. Interest payable annually. All payable at Phœnix, in Maricopa county Arizona, and — case suit is brought on this note I agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$1,241.73. A. J. DAGGS.

Due —— —, ——.

No. —. PHŒNIX, ARIZONA, *Nov. 1st*, 1894.

On or before one year after date, without grace, for value received I promise to pay to the Phœnix national bank or order the sum of twenty-five hundred dollars in U. S. gold coin, with interest thereon in like gold coin at the rate of ten per cent. per annum from date until paid. Interest payable annually. All payable at Phœnix in Maricopa county Arizona and in case — is brought on
317 this note, I agree to pay two per cent. of the amount found due hereon as attorneys' fees.

$2,500. A. J. DAGGS.

And this instrument shall be void if said promissory notes, principal and interest be well and truly paid when due ac-

[* Matter enclosed in brackets erased in copy.]

cording to the tenor and effect thereof. But it is distinctly understood and agreed that if the interest on said promissory notes or principal thereon, shall not be punctually paid when the same shall become due and payable and proceedings may forthwith be had by the said mortgagee the Phœnix National Bank its heirs, executors, administrators and assigns, for the recovery of the same either by suit on said notes or on this mortgage and notes; and in any suit or proceedings that may be had for the recovery of the said principal sum and interest thereon, it shall and may be lawful for the said mortgagee, its heirs, executors administrators or assigns to include in the judgment that may be recovered attorney fees not exceeding two per cent. thereon, upon the amount found due the plaintiff on said notes and mortgage, or in case of settlement after suit brought, but before judgment rendered, then one per cent. on the amount found due at the time of settlement, as well as all payments that the said mortgagee, its heirs, executors administrators and assigns may be obliged to make for its security, or on account of any taxes charges, incumbrances, or assessments whatsoever on the said premises legally laid and made thereon.

Witness my hand this 28th day of Nov., A. D. 1894.

A. J. DAGGS.

Signed, sealed, and delivered in presence of—

—— ——.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Before me, L. H. Chalmers, a notary public in and for the county of Maricopa, Territory of Arizona, on this day personally appeared R. E. Daggs, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

318 Given under my hand and seal of office this 28th day of Nov., A. D. 1894.

L. H. CHALMERS,
Notary Public.

The above was all the evidence offered by the defendant in error at this point and time.

Defense.

The following evidence was by the defense below offered and was by the court excluded over the objection and exception of defendant- below, appellant- here:

R. E. DAGGS, produced, duly sworn on part of defendants, was asked,

By COUNSEL FOR DEFENDANT-: One more question. You may state, Mr. Daggs, the agreement upon which you mortgaged your property as security for A. J. Daggs.

Plaintiff objects to the question.

By the COURT: What is the purpose of this?

By Mr. DAGGS: The defendant offers to show, by this witness, that he gave the mortgage on his property to secure the payment of these three promissory notes upon the express agreement with James A. Fleming, president of the Phœnix national bank, that the litigation over the five-thousand-dollar promissory note assigned to A. J. Daggs should be carried on in the name of the Phœnix national bank and pressed to judgment and settlement, and when the money obtained in that litigation was obtained it should go to liquidate and satisfy the three promissory notes sued on, for which he gave his mortgage to secure.

Plaintiff objects to the question. Objection sustained. Defendant- except.

The COURT, remarking: My theory is that the defendant is principal. Of course, in some circumstances, some courts have held very lately that you might prove this agreement, but the majority of the recent decisions hold and the tendency of the courts is to do away with these matters, and I believe that the better plan is to allow nothing to defeat a man's simple obligation, in writing like this, and that is the reason for my ruling.

319 By Mr. DAGGS: The defendant offers further to prove that if the note was not collected that it should be returned and the full amount of it turned and credit given on the three promissory notes, and that R. E. Daggs should not be held liable for any more than the difference between the $5,000 note and interest and the three promissory notes sued on.

Plaintiff objects to the offer to prove. The objection sustained. Defendant- excepts.

Witness excused.

(Endorsed:) No. 622. In the supreme court of the Territory of Arizona. A. J. Daggs, R. E. Daggs, pl't'fs in error, *vs.* The Phœnix National Bank, a corporation, def'ts in error. Objections & exception to evidence. Rec. service copy within paper May 29, 1899. L. H. Chalmers, att'y for def't in error. Filed Nov. 2nd, 1899. Lloyd Johnston, clerk, by Angie B. Parker, deputy.

TERRITORY OF ARIZONA, }
County of Maricopa, } ss:

I, Lloyd Johnston, clerk of the supreme court of the Territory of Arizona, do hereby certify the foregoing pages, numbered from 1 to 25, inclusive, contain full, true, and correct copies of notice and motion of appellants filed May 31, A. D. 1899, and the ruling and order thereon; statement of facts made by the court; the objections of the appellants to said statement of facts; statement of facts and objections & exceptions to evidence tendered by the appellants in

case of R. E. Daggs and A. J. Daggs against The Phœnix National Bank, as the same remain of record and on file in said court.

Seal Supreme Court of Arizona.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 23rd day of December, A. D. 1899, at Phœnix, Arizona.

LLOYD JOHNSTON,
Clerk Supreme Court of Arizona,
By ANGIE B. PARKER,
Deputy Clerk.

320 THE UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States to the judges of the supreme court of the Territory of Arizona, Greeting:

Whereas in a certain suit in said supreme court between R. E. Daggs and A. J. Daggs, plaintiffs in error, and The Phœnix National Bank, defendant in error, which suit was removed to the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"The notice and motion of appellants, filed May 31, A. D. 1899, and the rulings and orders thereon; the statement of facts made by the court below in this cause; also the objections of the appellants to said statement of facts; also the statement of facts
321 and bill of exceptions tendered by the appellants, now on file in the supreme court of Arizona Territory:"

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find, to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of December, A. D. 1899.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

322 [Endorsed:] File No., 16,997. Supreme Court U. S., October term, 1899. Term No., 138. A. J. Daggs and R. E. Daggs, appellants, *vs.* The Phœnix National Bank. Writ of certiorari and return. Filed Jan. 2, 1900.

Endorsed on cover: Case No. 16,997. Territory of Arizona supreme court. Term No., 138. A. J. Daggs and R. E. Daggs, appellants, *vs.* The Phœnix National Bank. Filed September 19th, 1898.

No. 412, 138
In the
Supreme Court of the United States.
Filed Oct. 15, 1898.
Supreme Court U. S.
FILED
OCT 15 1898
JAMES H. McKENNEY,
CLERK.

OCTOBER TERM, 1898.

R. E. DAGGS,
A. J. DAGGS,
APPELLANTS,
vs.
THE PHOENIX NATIONAL BANK,
APPELLEE.

No. 412

Appeal from the Supreme Court of the Territory of Arizona.

Answer to Motion to Vacate Supersedeas Bond or for Additional Security.

A. J. EDWARDS,
Attorney for Appellants.

PHOENIX, ARIZONA:
HERALD ELECTRIC JOB PRINT.
1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

R. E. DAGGS,
A. J. DAGGS,
APPELLANTS,
vs.
PHOENIX NATIONAL BANK,
APPELLEE.

No.

ANSWER TO MOTION OF APPELLEES TO VACATE SUPERSEDEAS BOND OR FOR ADDITIONAL SECURITY.

STATEMENT.

This action grew out of the foreclosure of a mortgage, which, with interest and cost, amounted to about $12,000, to which defendant plead in bar to the recovery of interest and also interposed a counter claim of more than $13,000, with a plea of failure of a part of the consideration of said notes and mortgage amounting to some $8,000. Judgment was rendered by the District Court, ignoring the entire defence of appellants and was afterwards affirmed by the Supreme Court of Arizona.

Upon investigation, from a legal standpoint, we find no substance in appellees' contention, and the only point that we feel called on to meet is appellees' charge of fraud, which we are constrained to say that appellees

have sought to prove by the grossest deceptive means and false affidavits. We shall take up each point or bit of evidence separate in its order, as it appears in the printed motion of appellees.

Appellees complain that we applied to the Honorable Joseph McKinna, justice of this court, and represented that the Chief Justice of Arizona had refused to act. In answer to this we submit the papers presented to His Honor Judge Street, together with the affidavit of A. J. Daggs, who presented them, as follows:

APPEAL AND ALLOWANCE.

The above named defendants, A. J. Daggs and R. E. Daggs, appellants, conceiving themselves aggrieved by the order and judgement entered on April 16th, A. D. 1898, affirming the judgment of the District Court of Maricopa County, Arizona, rendered and entered on the 12th day of November, A. D., 1896, for the principal sum of nine thousand seven hundred and forty-one and seventy-three hundredths ($9,741.73) dollars; and for interest on same to date of judgment, the sum of one thousand nine hundred and seventy-seven and ninety-seven hundredths ($1977.97) dollars, and for attorney's fees, the sum of two hundred and thirty-four and thirty-nine hundredths ($234.39) dollars, and for costs and disbursements the sum of ninety-eight and eighty-five hundredths ($98.85) dollars; making in all the sum of twelve thousand and fifty-two and ninety-four hundredths ($12,052.94) dollars. And that the said sum of nine thousand seven hundred and forty-one and seventy-three hundreths ($9741.73) dollars bears interest from date thereof at the rate of ten per cent. per annum; and that the said sum of two thousand three hundred and eleven and twenty-one hundreths ($2311.21) dollars bears interest from

date hereof at the rate of seven per cent. per annum, and with a foreclosure of plaintiffs' mortgage lien upon the lands and water rights covered by the said mortgage as it existed on the 28th day of November, A. D. 1894, in the above entitled proceedings, doth hereby appeal from said order to the Supreme Court of the United States; and they pray that this, their appeal, may be allowed; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

A. J. DAGGS,
Atty. for Defendants, Appellants,
A. J. Daggs and R. E. Daggs,
Phoenix, Arizona.

PHOENIX, ARIZONA TERRITORY,
April 23d, A. D. 1898.

And now, to wit: On April A. D. 1898; it is ordered that the appeal be allowed as prayed for.

Chief Justice Supreme Court of Arizona.

IN THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

TERRITORY OF ARIZONA, } ss.
County of Maricopa. }

A. J. Daggs, being first duly sworn, upon his oath deposes and says that he is one of the appellants in the above entitled action, that the amount in dispute in said cause is the sum of Nine Thousand Seven Hundred Forty-one dollars and seventy-three cents ($9741.73), that the same is for the foreclosure of a mortgage, covering more than Fifty Thousand Dollars' worth of real estate, located and situated in Maricopa county, Arizona. That the said case further involved the right of a national bank

to charge, receive and collect a rate of interest exceeding the sum of seven per cent as provided by the revised statutes of the United States, Par. 5197, 5198, there being no rate of interest fixed by the law in the Territory of Arizona.

A. J. DAGGS.

Subscribed and sworn to before me this ..... day of April, A. D. 1898.

A. J. EDWARDS,
Notary Public.

My commission expires March 4th, 1900.

CITATION.

UNITED STATES OF AMERICA, *ss*

THE PRESIDENT OF THE UNITED STATES.

To the Phoenix National Bank, a corporation, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October, A. D. 1898, pursuant to an appeal filed in the clerk's office of the Supreme Court of the Territory of Arizona, wherein A. J. Daggs and R. E. Daggs are appellants and you are respondent, to show cause, if any there be, why the said judgment rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

Chief Justice of the Supreme Court of Arizona.

PROOF OF SERVICE OF CITATION.

On this day of , in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared before me, the subscriber, and makes oath that he delivered a true copy of the within citation to

Sworn to and subscribed the day of A. D. 18

SUPERSEDEAS.

Territory of Arizona, ss:

Having considered the appellants' petition for an allowance of an appeal to the Supreme Court of the United States, I hereby certify that the Supreme Court of the Territory of Arizona is the highest court of law or equity in this Territory in which a decision in said case could be had, and that in my opinion there is involved in said case a Federal question, and it appearing by affidavit before me, that the amount involved in said case is more than the sum of five thousand ($5000) dollars, and that said case, being for the foreclosure of a mortgage lien, upon ample and sufficient property to satisfy the judgment, and all costs, and that the said property necessarily follows the suit, and said appeal having been allowed, as prayed for in said allowance of appeal, it is ordered, upon the filing of a supersedeas bond in the sum of , the same to be approved by the undersigned, all proceedings shall be stayed until the proceedings on said allowance of appeal in said cause shall be determined by

the Supreme Court of the United States. Said bond is furthermore now submitted and duly approved.

Chief Justice Supreme Court of Arizona.

APPEAL BOND TO SUPREME COURT U. S.

Know all men by these presents.

That we, A. J. Daggs and R. E. Daggs, as principals, and , as sureties, are held and firmly bound unto the Phoenix National Bank, a corporation, respondent in the full and just sum of , to be paid to the said Phoenix National Bank, a corporation, or its assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated the day of April, in the year of our Lord, one thousand eight hundred and ninety-eight.

Whereas, lately at a session of the Supreme Court of the Territory of Arizona, in a suit pending in said court, between A. J. Daggs and R. E. Daggs, and the Phoenix National Bank, a corporation, a final judgment of affirmance was rendered and entered against the said A. J. Daggs, and R. E. Daggs, and the said A. J. Daggs, and R. E. Dagg, having obtained an allowance of appeal, and filed a copy thereof in the Clerk's office of the said Supreme Court of the Territory of Arizona, to reverse the said judgment, in the aforesaid suit, and a citation directed to the said Phoenix National Bank, a corporation, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, on the day of , A. D. 1898.

Now, the condition of the above obligation is such,

that if the said A. J. Daggs, and R. E. Daggs shall prosecute said allowance of appeal to effect, and answer all damages and costs, it they fail to make their said appeal good, then this obligation shall be void, otherwise, the same shall be and remain in full force and virtue.

_____

_____

_____

The above and foregoing bond is this day approved by me, this the day of April, A. D. 1898.

_____

Chief Justice of the Supreme Court of Arizona.

A. J. Daggs, being duly sworn, says: That he presented the above papers to Webster Street, Chief Justice of Arizona, and ask that they be allowed and fixed:

1—Application for Allowance of Appeal.

2—Citation.

3—Affidavit of Value.

4—Supersedeas.

5—Blank Bond for amount to be fixed.

Very soon thereafter all of said papers were returned to me with the allowance of appeal scratched and garbled, as the originals appear on file in this court, and that these are the only papers ever presented by me or any one else in this case to said Street.

That I am the attorney for Wm. M. Billups in case No. 2362 of Wm. M. Billups vs. Utah Irrrigating Canal Co., as appears in the District Court docket of Maricopa county, Arizona, out of which case the $256.25 judgment arose, as is made to appear on page 10 of appellees' motion; that said judgment is for costs in the District

Court; that said case was by Wm. M. Billups appealed to the Supreme Court of Arizona, and is now on file undetermined in Supreme Court; that a supersedeas bond was given and is now on file in the case; that the real estate and personal property pledged to the Phoenix National Bank and under their mortgage is worth at a fair valuation at least fifty thousand dollars.

A. J. DAGGS.

Subscribed and sworn to before me by A. J. Daggs this 8th day of October, A. D. 1898.

R. E. DAGGS,
Notary Public.

My commission expires April 8, A. D. 1902.

Which shows conclusively that no appeal was allowed, no citition signed and *we re-iterate that our application was refused.* It is a singular coincident indeed that a litigant should spend several hundred dollars to apply for and get an appeal allowed at Washington, D. C., when it was already allowed at his own door without cost, besides it is our legal right to have an appeal allowed on application by any Justice of the Supreme Court of Arizona or any justice of this court, so held by this court in

Brown vs McConnell, 124, U. S. 489.

As to the certificate of the clerk on page 4 of appellee's printed motion and brief he is evidently mistaken as to the date when the papers were first presented, meaning June instead of May, as the appeal was not allowed until June the 6th, at Washington, D. C., on which date, June 6th, 1898, we presented our petition for allowance of appeal supersedes citation and *the bond approved in this case.* We presented this bond in the sum of $4,000, presented affidavits showing the value of the mortgaged property, together with the affidavit of the surety Billups as to his financial responsibility, which affidavit is as follows:

TERRITORY OF ARIZONA, } ss
County of Maricopa, }

Wm. M. Billups, being duly sworn, on oath says, that he is a resident householder of Maricopa county, Arizona, and the person who signed the supersedeas bond in appeal in this case; that he owns in his own right, situated in this county and territory, the following real estate, to wit: The N. E. ¼ and N. E. ¼ of the N. W. ¼ and N. W. ½ of the S. E. ¼ of section 10, township 1 north, five east, in all 240 acres, under high state of cultivation and reasonably worth $50 per acre, or $12,000; said land is free from incumbrance; also a brick house and two lots on Washington street, Phoenix, reasonably worth $4,000 and free from incumbrance; also the south ½ of N. E. ¼ of the S. W. ¼ section three, township one south, range five east, Maricopa county, Arizona, in all 20 acres, reasonably worth $30 per acre; total $600, free from incumbrance; also the north ½ of section 19, township one south, range five east, in all 320 acres, Maricopa county, Arizona, reasonably worth the sum of $30 per acre, total $9,600; also a stock of 27 head of horses, consisting of mares, colts, stallions, mostly standard bred, balance high grade trotting stock, worth at a reasonable valuation $100 per head, or a total of $2,700. Also farming implements sufficient to farm said land, also property in California, consisting of real estate and corporation stocks of the reasonable value of $5000, also some outstanding claims.

Deponent's entire indebtedness outstanding does not exceed the sum of $2,000, the total value of all deponent's property is reasonably worth the sum of $33,900.

Deponent is a married man, with wife and one child.

WM. M. BILLUPS.

Subscribed and sworn to before me this 25th day of May, 1898.

R. E. DAGGS,
Notary Public.

My commission expires April 8, 1902.

The honerable justice who approved the bond accepted the said bond as to amount but required more proof as to the financial responsibility of the surety and on the 17th day of June we sent the following two telegrams:

Received at Post Office Department, June 17, 1888.
Dated: Phoenix, Arizona, 17.

To Hon Joseph McKenna, care of D. A. McKnight, 501 F. street:

We consider Wm. M. Billups responsible for four thousand dollars. Has property here estimated over twenty-five thousand dollars.

WM. CHRISTY, President Valley Bank.

Received at Post Office Department, June 17, 1898.
Dated: Phoenix, Arizona.

To D. A. McKnight, 501 F. Street:

Billups perfectly responsible four thousand dollars, large property owner here.

THE LONDON CO.
Per J. A. DINES, Treasurer.

Thereafter His Honor Justice McKenna approved said bond and signed the supersedeas. The date of the bond and Justice McKenna will bear us out in this, we being aware of the decisions of this court, holding that the action of the Justice who approved the bond would not be reviewed, and having overlooked the note in the corner of the letter from the attorney who presented the application, that His Honor Justice McKenna desired the telegrams filed with the bond, and for the sole purpose of

saving as much expense of transcripting and printing as possible, we did not file the telegrams, as requested, and hence countered the wish of His Honor Justice McKenna, for which we are truly sorry, indeed, but clearly overlooked the note in the corner of the letter referred to above until this motion was served on us, calling attention to the fact, and on further examination of the letter. The telegrams will show for themselves. We still maintain that these telegrams are correct. The telegram by the London company's treasurer is not questioned, but the other, by Mr. Christy, is put in question by the man who sent it by affidavit. The question is raised whether A. J. Daggs presented a correct list of the Billups property and made a correct statement of its conditions to Mr. Christy, appellee, has cunningly avoided anything to show what this list was, or what it contained. We herewith present the same list, with the affidavit of A. J. Daggs.

A. J. Daggs being duly sworn, deposes and says that the same list of property shown Wm. Christy by affiant as the property owned by Wm. M. Billups is as follows:

240 acres Sec. 10; 2 lots and brick house in Phoenix, 20 acres Sec. 3 unincumbered; 320 acres Sec. 19, incumbered by Phoenix National Bank mortgage; seven water rights in the old UtahCanal proper; 27 head of standard horses.

That he denies ever making the statement that all of Wm. M. Billups' property was free from encumberance.

That Wm. Christy never ask affiant if Wm. M. Billups' property was encumbered, but Mr. Christy did ask how much Mr. Billups owed and that affiant informed said Christy that $2,000 would cover all that Mr. Billups owed, both direct and contingent.

That deponent told Mr. Christy expressly that one piece, the 320 described as the north ½ of Sec. 19, Twp.

1 South, range 5 East, on page 8 of respondent's motion was encumbered by respondent's mortgage but that the 240 acre tract, the 20 acres, the two lots and brick residence in Phoenix, his seven water rights in the old Utah Canal proper and his 27 head of standard horses, machinery, etc., were not encumbered.

That he told Wm. Christy that Mr. Billups had 25 or 30 thousand dollars worth of property in this county and a lot of property at Colusa, California, where he used to live. Whereupon Colonel Christy wrote the telegram referred to and set out in his affidavit and handed it to affiant and affiant wired it to Justice McKenna.

(Signed) A. J. DAGGS.

Subscribed and sworn to before me this 8th day of October 1898.

R. E. DAGGS,
Notary Public.

My commission expires April 8, 1902.

We deny that we said to Christy that all of Mr. Billups' property was free from incumbrance. We now reiterate that Mr. Billups has 260 acres of land, 27 horses, residence and two lots in Phoenix, and seven water rights, free from incumbrance, outside of the 320 acres subject to the mortgage of appellee; and as appellee has more than $40,000 worth of other property under this mortgage, Mr. Billups has the right to compel them to marshall assets and sell the other property first, which will leave this 320 acres in a condition to be considered practically free from incumbrance. Mr. Christy says he has been shown an abstract and that all Mr. Billups' property is *seriously incumbered*, and appellee follows this affidavit with what purports to be the abstract, which shows on its face that it is not an abstract and only a grossly inaccurate statement, and leaves out nearly one-half of Mr.

Billups' land, in fact, shows on its face that it was made for the occasion and, perhaps, to show Mr. Christy.

Let us see if Billups' property is seriously incumbered, according to appellee's own statement. Take the tax list affixed it gives Mr. Billups $5,219, without the 320 acres of land covered by appellee's mortgage (which surely Billups does not owe.) Appellee's own purported abstract shows liens by judgment of $332.25, $5,210—$332.25=$4,877.75, besides the second item on the assessor's list shows that he has only valued 20 acres of land, when he should have valued 40 acres. So add $275 to that valuation and, according to his own valuation, Billups has $5,955 over this "*serious incumbrance*"

It will be noted that this so called abstract gives the balance due on the first judgment noted as $76.45 on May 25, 1897. This being 17 months afterwards, this is for the purpose of creating the impression that it is due now, when the same has long since been settled. The other $256.25 judgment we show has been appealed, and supersedeas bond given and is now pending before the Supreme Court of Arizona; but this so called abstract fails to reveal that fact to this court.

See the affidavit of A. J. Daggs above.

The assessor certifies that this property is assessed at its cash value, and appellee puts great stress on this value. It only remains to see what the assessor means by cash value. See certificate furnished us by the assessor, as follows:

TERRITORY OF ARIZONA, } *ss.*
County of Maricopa. }

I, Frank Luke, do hereby certify that I am County Assessor of Maricopa County, Arizona, and in making valuations on property assessed in Maricopa County the laws of Arizona require me to assess property at its cash value; under my construction of the laws I value property

at what in my judgment the property would sell for under forced sale on execution without regard to its true or commercial value.

I further certify that C. H. Hakes, Deputy Assessor, assessed the property of Wm. M. Billups for the year 1898.

In witness whereof I have hereunto set my hand this 21st day of September, 1898.

FRANK LUKE,
Assessor.

Besides, the assessor certifies that Mr. Hakes assessed Mr. Billups this year, and if we sell Mr. Billups out under forced sale, he has over $5,000, according to the proof of appellee.

Next take the tax sales for instance. This *so called abstract* does not show to whom these sales were made; the reason of this is, if it had it would have shown that they create no lien on the property. The sale of 1890, certificate No. 77, was before the land was entered, hence a tax on government land. See letter of government land agent of Tucson.

TUCSON, ARIZONA,
September 29, 1898.

MR. R. E. DAGGS,
Phoenix, Arizona.

SIR.—In reply to your favor of the 28th I have to say that final proof was made by W. A. Daggs for the N. E. ¼ of Sec. 19, Twp. 1 S, R. 5 E, on July 24, 1892, and of course final receipt bears that date.

Very respectfully,
JOHN H. BAUMAN,
Receiver.

Hence a nullity, but this abstract does not show it. Certificate No. 96, year 1894, was sold to the owner, R.

E. Daggs. See affidavit of R. E. Daggs and certificate D. L. Murray, as follows.

R. E. Daggs being duly sworn, deposes and says that he was the owner of the North ½ of Sec 19, Twp 1, South, Range 5 East, when tax certificate No. 96 was issued, and that he purchased the certificate himself and had it issued to himself to protect the property.

That tax certificates No. 391 and 393 were purchased by L. H. Chalmers, attorney for the Phoenix National Bank, the mortgagees, at the request of appellants to protect the property and that all of said certificates were and are now in the possession of appellee.

R. E. DAGGS.

Subscribed and sworn to before me this the 8th day of October, 1898.

WM. A. HANCOCK,
Notary Public.

My commission expires October 13th, 1900.

PHOENIX, A. T., September 26, 1898.

I, D. L. Murray, treasurer and tax collector of Maricopa County, Arizona, do hereby certify that the property embraced in Tax Certificate No. 96, year 1894, was sold to R. E. Daggs, that the property embraced in Tax Certificate No. 391, year 1896, and No. 343, year 1897, was sold to L. H. Chalmers.

D. L. MURRAY,
Treasurer and Tax Collector.

Hence no lien. This fact was well known to the appellee but is withheld from the court. Certificates No. 391 and 341 were purchased at our request by Attorney Chalmers for the Phoenix National Bank (see certificate of Murray above), he being the attorney for the mortgagee, see his affidavit on page 15 of Appellee's Brief and Mo

tion. All this appellee well knew but so constructed the proof and so called abstract that it would not appear. Certificates No. 38 and 39 for the year 1893 were issued before the appellee's mortgage and are in the hands of appellee at this time. The next to call our attention is the affidavit of Expert Jerry Millay who swears that "*in his opinion* nothing could be collected by execution from Wm. M. Billups" and that *he does* not consider Billups good for any amount on any bond. The extreme utterance of this affidavit shows the utter flagrancy of this deponent in the face of the proof offered by appellee. The so-called abstractors certificate and the assessor's list showing more than $7,000 values, and the fact that appellee only claims that Billups is not sufficient security for this amount, yet Millay swears that *in his opinion* nothing could be collected from Billups on execution. The assessor certifies that Billups' property would sell for $7,770 on execution and does not assess his water stock as the canal and not the stock is assessable. The next we find is the affidavit of Mr. Chalmers. We agree with Mr. Chalmers exactly and have selected men who know specifically the values in these localities. The next after Mr. Chalmers' affidavit comes the argument of the learned counsel for appellee. We will only refer to this for the purpose of correcting some (we hope) unintentional mistakes or omissions. The first point, appellee ask the court to raise the bond to $10,000 without showing any necessity therefor or any proof that the mortgaged property is not ample, when we assert that the property covered by the mortgage as first lien is worth more than $50,000. Appellees offer the certificate of Chief Justice Street showing that he fixed the bond at $10,000 without proof that he acted correctly and asks this court not to review the evidence and action of his honor, Justice McKenna, but to set aside the action of Judge McKenna,

not as incorrect but because Judge Street says he fixed the bond at $10,000. If we had not of tendered a $4,000 bond and consider that Justice McKenna acted properly, we would insist that $1,000 would be ample in this case but having tendered $4,000 in order to save any possible delay as our time was growing short to get a supersedeas we will not ask a reduction. This court has however repeatedly held that it would not review the action of a a justice of this court in accepting bonds, see

Jerome vs. McCorter, 21 Wall,
Page 17. The leading case on the point.

Counsel next says the proof shows that the only real property owned by the surety, Billups, is 40 acres on section 10. The appellee's proof shows that Billups owns 240 acres on section 10, which is correct, and this 40 acres is a part, and is valued as 20 acres at $275; this should be doubled to $550. The next is lots 2 and 3 in Block 14, Collins Addition to the City of Phoenix, which the assessor does say are worth $220 sold under forced sale. The assessor also says these two lots have $1,200 improvements. This $1,200 the learned counsel has overlooked. The next is the N. ½ of section 19 which appellee says is subject to the mortgage sought to be foreclosed in this case. This we admit. We have heretofore commented on this property. The 20 acre tract on section 3 was subject to a tax sale and deed, but that was caused by double assessment, and is cleared by the quit claim deed of James, as follows:

(Copy quit claim deed of James.)

We deny that the proof of appellee sustains his contention We submit the following further proof in addition to what we already have:

W. A. Daggs being duly sworn says that he is a farmer

and stock raiser by occupation and lives on lands under the old Utah ditch proper.

That he is well acquainted with the values of land under the different canals in Maricopa county, Arizona, and was the president of the old Utah canal proper for a long term of years, and is well acquainted with the values of land and water under the old Utah canal proper and lives on a farm adjoining the ranch of about 240 acres known as the Wm. M. Billups ranch and his seven shares of old Utah water. Said land is described as follows:

The N. E. ¼ of Sec. 10, Tp. 1 north, R. 5 east and N. E. ¼ of the N. W. ¼ of Sec. 10, Tp. 1 north, R. 5 E., and N. W. ¼ of S. E. ¼ Sec. 10, Tp. 1 north, R. 5 east, all in Maricopa county, Arizona Territory, and that he is one of Wm. M. Billups' grantors and knows that Wm. M. Billups is now occupying and cultivating said ranch, and states that said ranch is in a high state of cultivation, in alfalfa, vines, pears, peaches and other fruits, and that in affiant's opinion such lands are worth, at a fair valuation, $60 per acre at this time. This valuation includes the seven Old Utah water shares, worth separate from the land, at this time $4000.

That he is also acquainted with the S. ½ of the N. E. ¼ of Sec. 3, Tp. 1 south, R. 5 east, belonging to Wm. M. Billups, and that it is reasonably worth $35 per acre, that it is situated under two canals.

That he is also acquainted with the N. ½ of Sec. 19, Tp. 1 south, Range 5 east, Salt River base and meridian, Maricopa County, Arizona Territory, owned by Wm. M. Billups, and knows from sales of other lands adjacent thereto that said land is worth fairly $30 to $35 per acre. That said lands can be reached by six canals, and is under cultivation for wheat and barley.

That he is well acquainted with the fine string of standard bred trotting horses, numbering some twenty-seven

head, belonging to Wm. M. Billups, and that they are worth at least over $125 per head.

That he knows Wm. M. Billups' residence property in Phoenix, Arizona. That such residence is located on Washington street, the principal business street, with electric car line passing in front of the door. That Wm. M. Billups has all conveniences to his said brick residence, and such property ought to be worth in the neighborhood of $5,000.

W. A. DAGGS.

Subscribed and sworn to before me this 4th day of October 1898.

R. E. DAGGS,
Notary Public.

My commission expires April 8, 1902.

That affidavit not only shows the value of the property of the surety Billups, but shows his qualifications to pass on its values as required by appellee's own proof (Mr. Chalmer's affidavit). This proof shows the total value to reach $33,075. The next we submit the affidavit of T. L. Schultz.

Col. T. L. Schultz being first duly sworn, deposes and says, that he has dealt in real estate in the Salt River Valley, Maricopa County, Arizona, for the last past fourteen years and is acquainted with lands under all the irrigating canals and the water stocks in each canal in said county and territory, and the values thereof. That he is well acquainted with Wm. M. Billups' ranch consisting of about 240 acres of land situated, lying and being the N. E. ¼, section 10, and the N. W. ¼ of the S. E. ¼ of section 10, township 1, N. R. 5 E., Gila and Salt River Base and Meridian, Maricopa County, Arizona. That such lands are under the old Utah Canal proper and now in alfalfa. That under that Canal the water shares

are very valuable for the reason that share owners, own the water, that the shares represent property, and are transferable like bank stock.

That such shares are well worth $500 per share having a priority of right over most other canals to draw water during scercity of water, and in connection with land, land and water are considered to be worth at least 40 Dollars per acre cash. Such land will yield in any fair season 30 bushels of wheat or 40 to 50 bushels of barley and from 5 to 6 tons of alfalfa hay per acre.

That he knows Wm. M. Billups owns a brick residence in Phoenix worth four or five thousand dollars, and other property and is one of the large property owners in the Salt River Valley and is considered to be responsible for any contract that he will make.

THEO. L. SCHULTZ.

Subscribed and sworn to before me by Col. T. L. Schultz this 30th day of Sep., A. D. 1898.

R. E. DAGGS,
Notary Public.

My commission expires Apri 8, A. D. 1902.

Which shows for itself that this witness estimates the 240 acres and residence value at $13,600.

The next affidavit we submit Mr. L. F. Kiggins.

L. F. Kiggins being duly sworn deposes and says, that he is a resident of Maricopa County, Arizona, and has been for the last past six or seven years. That he is acquainted with Wm. M. Billups personally and owns property adjoining his 240 acre ranch, and knows his 20 acre tract and his 320 acre tract, and in fact knows all his property, both real and personal, the value thereof, and that his 240 acre ranch is one of the finest in Salt River valley. That Mr. Billups has an abundance of water in the Old Utah canal proper and keeps this ranch in fine

condition. That it is worth, land and water, at least $50 per acre, cash.

That lands vary in value in Salt River valley, and Mr. Billups' other land is not worth so much; such lands are worth $30 to $35 per acre.

That Mr. Billups has seven shares of water in the Old Utah canal proper that will sell for cash $500 per share.

That Wm. M. Billups has a fine brick residence in Phoenix that he knows is worth four or five thousand dollars.

That Mr. Billups is considered here by every one who knows him at a careful business man and perfectly reliable, and responsible for any contract that he signs.

That Mr. Billups has a fine string of high bred trotting horses, but I am not posted in their value. Horse men say they are very valuable— worth $125 to $150 a head.

L. F. KIGGINS.

Subscribed and sworn to before me this 6th day of October, 1898.

R. E. DAGGS,
Notary Public.

My commission expires April 8, 1902.

This witness shows the surety, Billups, to be worth a total of $29,575, putting it at his lowest estimate. The surety's, Billups', affidavit states his circumstances very fairly, as shown above. His own estimate puts his property at a total of $33,900. Deduct from this $2,000 for debts, leaves a net value of $31,900. Millay says he could not make a cent off of Billups on execution.

Mr. Gill, Clerk of the District Court, has examined this surety *on oath* as to his financial responsibility and hence is thoroughly qualified to speak on the subject. The following is his certificate:

I, Edwin S. Gill do hereby certify that I am the Clerk

of the District Court of the Third Judicial District of the Territory of Arizona.

That I have examined Wm. M. Billups on his oath touching his qualifications as a surety on bonds, and I consider Wm. M. Billups a most excellent surety on a bond of Four Thousand Dollars.

EDWIN S. GILL,
Clerk District Court for 3d Judicial District.

ARGUMENT.

Appellee cites the case of R. R. Co. vs. Schutt to support them. That case supports appellants. In that case fraud was admitted. Where in the case at bar the charge of fraud is denied and we have submitted proof showing that the surety we offer is a most excellent surety for the bond we tendered and by the Hon. Justice accepted.

Outside of the showing made by appellants the showing made by appellee scarcely casts an inference against the sufficiency of the surety. They show he pays taxes on more than $5,000 worth of property which the assessor certifies is no measure of its true and commercial value. All know that an assessed value in Arizona is never more than one-fifth the value, so by appellee's own showing the surety must be worth over $25,000, and appellants show and prove that he has property worth more than $25,000.

The certificate of the Clerk of the District Court of the 3d Judicial District of Arizona is very significant. He approves all the bonds and qualifies all the sureties thereon in this court and he certifies that he has tested the surety, Billups, on oath before him and he considers Billups a most excellent surety for $4,000. We venture that the clerk of our court, whose official duty it is to accept sureties on bonds, is the most competent person to

pass on the qualification of persons offered as surety on bonds in this vicinity and his certificate to our mind is conclusive.

We have but one abstract company in Phoenix and they have never made an abstract of Mr. Billups' property. It would cost more than $100 to abstract his property. The cunning list shown Mr. Christy and from which Christy swears that all of Billups' property is seriously incumbered, is not an abstract. If appellee will go to the expense of $100 and furnish this court with an abstract of all of Billups' property, it will show him to have the property just as he swears he has.

To vacate the supersedeas in this case would enable the appellee to sacrifice this vast property at forced sale before our rights can be heard in this court and mulct us in further and needless litigation to protect ourselves.

Appellee asks for more security. We say that bonds are only required by this Court, in cases of this kind, where the property necessarily follows the suit, in an amount sufficient to cover "costs and just damages for delay."

Rule 29.
Jerome vs. McCorter, supra.
Kuntz vs. Omaha Hotel Co.
107 U. S., page 378.
Supervisors vs. Kinnicatt, 103 U. S., 554.
Omaha Hotel Co. vs. ———, 108 U. S., 911.

In this case appellees have a first lien on over $50,000 worth of property. They have a good bond now on file in this court for $4,000, with as good security as can be had, to cover costs and delay, all for a claim of $12,000. They ask for more—a $10,000 bond, or for additional security to the $4,000 bond.

Our showing heretofore is our answer to this request

and respectfully submit that their motion is without merit and should be denied.

A. J. EDWARDS,
Attorney for Appellants.

Supreme Court of the United States

A. J. DAGGS,
Appellant,

vs.

No. 1[illegible]

THE PRESIDENT AND DIRECTORS OF THE FARMERS' BANK,
Corporation, Appellee.

Appellants' Reply to Appellee's Opposition Brief to Appellants' Motion Suggesting Diminution of Record and for Certiorari.

A. J. DAGGS,
Attorney for Appellants.

IN THE

Supreme Court of the United States.

R. E. DAGGS,
A. J. DAGGS,
Appellants,

vs.

THE PHŒNIX NATIONAL BANK,
A Corporation, *Appellee.*

No. 138.

Appellants' Reply to Appellee's Opposition Brief to Appellants' Motion Suggesting Diminution of Record and for Certiorari.

Appellee assumes in his position that the court below allowed the appeal, and that appellants having failed to file their motion in time to have the statement of facts come along with the papers, or together with the transcript, or come up with the appeal, is therefore too late.

Appellee then assumes that the court below has no power after judgment to enter a finding of fact after appeal is taken.

Both positions are erroneous.

The state of facts assumed are not the facts in this case.

Statement of the Facts.

Appellants applied to the Chief Justice of Arizona for allowance of appeal and was refused. An application was then presented to Justice McKenna of this court and was allowed.

"And now to wit on June 6, A. D. 1898, it is ordered that the appeal be allowed as prayed for.
[SEAL] "Joseph McKenna,
"Justice of Supreme Court, U. S."

Rules of this court require transcript to be filed in this Court in sixty days after allowance of appeal, which was done, as appears by appellants' motion. Rule 9, subdivision 4, rules of this Court.

At time this appeal was allowed Supreme Court, Arizona Territory, was not in session and did not meet again until Jan. 1899. Par. 599, Rev. Stat. Arizona is as follows:

"The session of the Supreme Court shall hereinafter in each and every year be held at the seat of Government, commencing on second Monday in each year."

No one judge has the power to make a statement of facts in the nature of a special verdict and certify rulings on admission or rejection of evidence when excepted to. This must be done by the court in *Banc.*

Act Congress, April 7, 1874, Chap. 80, 1 Sup. R. S. 13, is as follows:

"Provided that an appeal instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict and also the rulings of the court on the admission and rejection of evidence when excepted to, shall be made and certified by the court below and trans-

mitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree."

This Court has said also:

"The statement of facts contemplated by the statute is one to be made by the Supreme Court, from whose judgment the appeal is taken."

Haws v. Victoria etc. Mining Co., 160 U. S. 303, reading page 313.

Appellants must, and did wait until Supreme Court of Arizona met second Monday in January, 1899.

At the opening of court, second Monday of January, A. D. 1899, appellants by oral motion (the usual and customary practice in such matters in that court) ask the court to make the statement of facts, etc., and certify the rulings of the court on the evidence, etc., etc., in this case, and the court intimated it would be done thereafter, at same term, and on May 31, 1899, the court not having yet made the papers above referred to, made and filed their notice and motion asking the court to make and certify statement, etc., and certify rulings on evidence, and when the court met appellants called up their motion and ask for ruling on June 1, 1899, and on June 2, pressed again for ruling on their motion, when the court made the following order: "In this cause it is ordered that the motion for the court to sign and file statement of facts filed herein by plaintiff in error be submitted," and immediately made the following order:

"It is ordered that this court stand adjourned *sine die*."

Thereafter on October 30, A. D. 1899, the court below held a special session of court, and again appellants pressed for rulings on their motion already submitted

June 2, 1899, and the court on November 1, A. D. 1899, made the following order:

"It is ordered that this court stand adjourned until January 6, 1900."

Thereafter on November 2, A. D. 1899, there was filed in Supreme Court of Arizona a paper styled "Statement of Facts in the Nature of a Special Verdict," in this cause, and dated November 1, A. D. 1899, and said paper is now on file in the court below as a part of the record in this case. Appellants, as soon as sufficient data and information could be obtained to enable them to act, made and filed on November 26, A. D. 1899, their motion suggesting diminution of the record.

This appeal having been allowed by this court, and the papers filed in this court within the rules and practice of this court and its jurisdiction over the case attached, and this paper now on file in the court below being an important part of its record, the question is, can this court aid its jurisdiction by any means and perfect its records so as to be able to pass on the case?

It has power to issue all writs necessary to its jurisdiction.

Rev. Stat., U. S., Sec. 716.

This includes a writ of certiorari.

It is not only proper, but it is the duty of appellant to bring into this court every paper necessary or proper in aid of its jurisdiction, and that by certiorari.

May, Supreme Court, U. S., Practice, 305.
Hoskins v. Fisher, 125 U. S., 217, reading pages 223 and 224.
M., K. & T. R. R. Co. v. Dinsmore, 108 U. S., 30.
May, U. S. Practice, 305.

Certiorari lies to perfect the record even after the case is submitted. This court will continue the case and order certiorari for record when justice can not be done without it.

Morgan v. Curtenius, 19 How., 8.

This paper being a paper the inferior court must make, and taking the place of the evidence in the case, it becomes a very important paper, and should the inferior court refuse to make this paper, this court has the power by mandamus to compel it to make and certify a statement, etc., like it would have to compel the making and signing of a bill of exceptions, it being the *legal duty* of the inferior court to make it.

Ex parte, Cram., 5 Pet., 190.
Chautauqua Iron Co., Petitioners, 128 U. S., 544, 557.
Ex parte, Cutting, 94 U. S., 14, 19, 21.
Ex parte, Milwaukee R. R., 5 Wall., 825.
155 U. S., 303.
Noble v. Union R. R., 147 U. S., 165.
Authority might be multiplied indefinite.

Hence there can be no doubt about the power of this court to reach out and perfect its records even to compelling the making of a statement of facts and exceptions and then bring it up.

Appellee's Mistaken View of the Law.

Appellee invokes the case of Cohn v. Daley, 174 U. S., 539, decided under the laws of Arizona, as it stood in 1892, which have been repealed by the act of the Nineteenth Legislative Assembly, No. 71, in 1897.

Under the latter act the case at bar was taken from the

District Court to the Supreme Court of Arizona, and which last mentioned act does not require a statement of facts or finding of facts, nor any bill of exceptions whatever. The parts that apply to this point are as follows:

"SEC. 2. The clerk of the District or Circuit Court, as the case may be, when an appeal or writ of error is taken from said Court to Supreme Court of Territory, shall certify and transmit the entire record, including the original papers on file in his Court and all minute orders in the case, to the Supreme Court of the Territory, and it shall not be necessary for the plaintiff in error, or appellant, to file with the Supreme Court any transcript, assignment of errors, or other papers, except as herein provided."

"SEC. 5. All rulings made by the court below in opposition to the plaintiff in error or appellant shall be taken as excepted to by the party appealing or suing out the writ of error, and when assigned as error in the brief shall be reviewed by the Supreme Court without any bill of exceptions or other assignment of error except as herein provided."

"SEC. 8. All acts and parts of acts in conflict with this act are hereby repealed."

Act approved March 18, A. D. 1897.

Judgment in this case was rendered and entered November 12, A. D. 1896.

That citation instead of applying has no application, and moreover the law therein quoted stands repealed, and was repealed when this case was appealed to Supreme Court of Arizona, and therefore there is no statement of facts or bill of exceptions from the District Court of Arizona taken to the Supreme Court thereof (so also the law requiring statement of facts to be made thirty days after judgment is rendered was not passed until March 16, A. D. 1897, nearly five months after judgment was rendered, November 12, 1896, this accounts for the quotation without citation where the law could be found).

Referring again to the making of a statement of facts and certifying the objections and exceptions to the rulings in the case to this court as shown, *supra*, it becomes doubly important to have those two papers made, for that this court is limited to the question of whether the statement of facts will sustain the judgment and cannot go into the evidence to see whether it sustains the statement of facts.

Stringfellow v. Kain, 99 U. S., 610.
Gray v. Howe, 108 U. S., 12.
Haws v. Victoria etc. Co., 160 U. S., 303.
Marshall v. Burtis, 172 U. S., 630.

And upon the bill of exceptions whether, under the pleadings, the objections were well taken at the trial:

Idaho Land and Imp. Co. v. Bradbury, 132 U. S., 518.
Saline etc. Co. v. Saline etc. Co., 163 U. S., reading page 118.

Without these two papers the scope is narrowed down to the points of law arising on the record proper.

Harrison v. Perea, 168 U. S., S. C. Reporter, 311.

It becomes then very, very important to have the two papers referred to as this court cannot decide a case on the merits without them.

Argument.

The other quotations are so scant and meager that an examination reveals nothing bearing on the case. The entire theory of appellee is erroneous. His state of facts is wrong. The question is not what should be done should the lower court have done its duty and allowed this appeal and then a great delay happened without any

excuse therefor. But the true question is has this court the power in aid of its already acquired jurisdiction (which is not disputed), appellants having done everything in their power to perfect the record, to reach out by certiorari for the so-called statement of facts made and filed in the court below as a part of the record of this case? This court has the power, as we have shown, to compel the inferior courts to make such papers. Having such power it would hardly seem reasonable or just that it did not have the power to bring such paper to this court after it was made. We think it has it. Suppose the lower court should refuse to act at all in such case. Could it by any obstacle defeat the jurisdiction of this court? We hardly think so.

Neither do we think that this court will jump at the conclusion reached by appellee that it will affirm this judgment long before it has considered the record. There is a federal question appearing on the face of the pleadings, also a demurrer disposing of one of appellants' counterclaims on the record proper, both pure questions of law.

And when this so-called statement of facts is properly before this court it will raise the question whether it will sustain the judgment.

That appellants objected to the so-called statement of facts, and that "foreshadows plain purpose to seek in this court review of testimony" as charged by appellee is too superficial for comment. As we have shown, the testimony can only be examined by the avenue of a bill of exceptions, and then the court will see under the theory of the case whether the objections were well taken at the trial, but not for the purpose of seeing whether the evidence sustains the statement of facts.

Wherefore appellants submit that the motion should be sustained and the writ of certiorari ordered.

A. J. DAGGS,

Attorney for Appellants.

Office Supreme Court U.
FILED
DEC 6 1899
JAMES H. McKENNEY,
Clerk

No. 138.

Brief of Daggs for Appt. (on M

Filed in the Dec. 6, 1899.

Supreme Court of the United States.

R. E. DAGGS,
A. J. DAGGS,
Appellants,

vs.

THE PHŒNIX NATIONAL BANK,
A Corporation, *Appellee.*

} No. 138.

Appeal from the Supreme Court of Arizona Territory.

Brief on Appellants' Motion to Pass and Continue this Cause and Place it at the Foot of the Docket.

The facts upon which this motion is predicated are stated in the motion paper.

There is no "certified rulings of the court below on the admission or the rejection of the evidence when excepted to" (or Bill of Exceptions) in the transcript of the record on file in this Court, nor on file in the court below, neither has a Bill of Exceptions ever been made by that court.

Appellants at the trial of this cause in the district court made their objections to the rulings of the court on the admission and rejection of evidence and duly took their exceptions at time when overruled, and such objections and exceptions are all in the record now on file in the Supreme Court of Arizona and have been ever since the appeal was allowed to this Court.

The Bill of Exceptions is a document that Supreme Court of Arizona in *Banc* must make and certify to this Court.

18 Stat. at Large, 27.
Haws v. Victoria Mining, etc., Co., 160 U. S. 303, reading page 313.

The appellants have a legal right to insist that the court below make and "certify the rulings of the court on the admission or rejection of evidence when excepted to" because this court will not review the rulings on the evidence without it.

Haws v. Victoria Copper Mining Co., 160 U. S., 303, reading pape 312, where this Court said:

"Under the act of April 7, 1874, C 80, 18 Stat. at Large, 27, our jurisdiction in appeal from the judgment of a Territorial Supreme Court is limited * * * to reviewing the rulings of the court on the admission or rejection of testimony when exceptions have been duly taken to such rulings."

Idaho, etc., Co., v. Brodbury, 132 U. S., 509, reading page 514.
San Pedro and Canon Del Agua Co. v. United States, 146 U. S. 120.
Tucker v. U. S., 151 U. S., reading page 170.
United States v. Bruttig, 20 How. 252.
Mammoth Mining Co. v. Salt Lake Foundry Co., 151 U. S., 447.

Runkle v. Bornbon, 153 U. S., 216, reading page 222.
Glenderslin v. New Mexico Mining Co., 161 U. S., 577.
Saline Stock Co. v. Salina Creek Co., 163 U. S., 109, reading page 118.
Harrison v. Perea, 168 U. S., 311.
Grayson v. Lynch, 163 U. S., 468.

Argument.

Appellants having done all in their power to obtain the Bill of Exceptions in this case, and the court below not having yet made it, nor refuse to make it, nor accepted the Bill of Exceptions tendered by appellants, nor refused it, and now having adjourned the court until January 6, 1900, and without such Bill of Exceptions appellants will loose all of their exceptions to the rulings of the court below on the admission or rejection of evidence.

It being the legal duty of the court below to make this Bill of Exceptions and appellants' legal right to have it, they insist upon it.

They, therefore, ask that this cause be placed at the foot of the docket and such time be granted, under the circumstances, as will be sufficient to obtain the Bill of Exceptions herein and bring it to this court that justice may be done.

A. J. DAGGS,
Attorney for Appellants.

No. 156

Brief of Points for

Filed Feb. 23, 1903.

IN THE

Supreme Court of the United States.

R. E. DAGGS, A. J. DAGGS,
Appellants,
vs.
THE PECOS NATIONAL BANK,
A Corporation, *Appellee.*
} No. 156.

Appeal from the Supreme Court of the Territory of Arizona.

Brief, Points, and Authorities of Appellants.

A. J. DAGGS,
Attorney for Appellants.

IN THE

Supreme Court of the United States.

R. E. DAGGS, A. J. DAGGS,
Appellants,
vs.
THE PHŒNIX NATIONAL BANK,
A Corporation, *Appellee.*
} No. 138.

Appeal from the Supreme Court of the Territory of Arizona.

Brief, Points, and Authorities of Appellants.

This is an appeal from a judgment of the Supreme Court of Arizona Territory affirming a judgment brought there by a writ of error from a judgment of the District Court of the Third Judicial District of the Territory of Arizona, in and for Mericopa County.

Abstract Statement of the Case, Showing Questions Involved and Manner in which they are Raised (Rule 21).

The facts out of which this litigation arose are:
That on November 28, 1894, the appellant, A. J.

Daggs, and appellee entered into two written contracts, the appellee offering to sell and the appellant purchasing of it two blocks of property.

CONTRACT NO. 1, EXHIBIT 1, PAGE 69 RECORD.

Appellant, A. J. Daggs, gave his three promissory notes, aggregating $9,741.72, secured by three mortgages on real and personal property described therein, two of which were executed on the separate property of appellant, A. J. Daggs, and one was executed as surety by appellant, R. E. Daggs, on his separate property, the notes being signed by appellant, A. J. Daggs, alone. Appellant, A. J. Daggs, also pledged personal property, not mentioned in either of the three mortgages, water stocks of the value of $4,000, to secure the three promissory notes. In consideration of aforesaid notes, etc., the appellee sold and assigned, transferred and set over to appellant, A. J. Daggs, that certain promissory note executed by W. A. and P. P. Daggs as partners, and W. A. and P. P. Daggs as individuals, to Thomas Armstrong, Jr., and then owned by the appellee, for $5,000, and said $5,000 note was reputed to be secured by chattle mortgage on personal property in Coconeno County, Arizona, and it was expressly stipulated that these said three notes were taken in full payment and satisfaction by appellee for the said $5,000 note aforesaid.

It was agreed further in the same contract that said $5,000 note was then in litigation between Hugh McCrum, of San Francisco, California, v. W. A. and P. P. Daggs, defendants, and The Phœnix National Bank, appellee, as intervenor, and D. A. Abrams, assignee of The Bank of Tempe, Arizona Territory, to determine the priority of right under their several mortgages, each covering same property as mentioned on said note as under chattle mortgage to secure the $5,000 note. The suits at that

date, November 28, 1894, having been already tried in the District Court of Coconeno County, Arizona, and held against The Phœnix National Bank, the appellee, and the property given to Hugh McCrum, of San Francisco, California, from which judgment The Phœnix National Bank, the appellee, had taken its appeal to the Supreme Court of Arizona, which said appeal was then pending in the Supreme Court of Arizona Territory, and which litigation over the $5,000 note and the priorities of mortgages was also sold and assigned and transferred to the appellant, A. J. Daggs, for the above three promissory notes.

It was also agreed and stipulated in the same contract that the above litigation between the respective parties thereof, to determine the priority of rights to the property under the respective mortgages, should be continued in the name of the said The Phœnix National Bank, appellee, until such suit was finally determined and settled, and that after November 1, 1894, the cost of that litigation should be paid by appellant, A. J. Daggs, and that appellee should pay costs prior to that date.

This $5,000 note and interest above described, and the litigation over it to determine the priority of the several mortgages over the property securing it, constituted part of the consideration of the $9,741.72 notes, and was all sold and assigned and calculated and put into the three notes sued on at $5,200.

The suit of Hugh McCrum v. W. A. and P. P. Daggs, partners and individuals, and The Phœnix National Bank, the appellee, as intervenor, and D. A. Abrams, assignee of The Bank of Tempe, to determine the priority of their several mortgages covering the property mentioned in the contract of sale first referred to, was affirmed by the Supreme Court of Arizona Territory, the appellee having lost the suit in both the District and Supreme

Courts of Arizona, and there all the property under the chattle mortgage mentioned on the $5,000 note was lost, and the security to the $5,000 note given to Hugh McCrum, of San Francisco, California, under his first mortgage. After which A. J. Daggs, appellant, under the first contract, attempted to take an appeal from the Supreme Court of Arizona Territory to the Supreme Court of the United States, and upon his request to The Phœnix National Bank, appellee, to allow its name to be used in carrying on the suit to the court of last resort, it refused to allow its name to be used to take the appeal, or to allow its name to be used in the appeal, and refused to sign the bond on the appeal. After which appellant, A. J. Daggs, requested the appellee to allow him credit on the three notes sued on for the $5,000 note, and interest and credit was refused.

CONTRACT NO. 2.

The other part of the consideration of the three notes in suit consisted in an overdraft, together with the collaterals attached thereto, then held by the appellee against The Bank of Tempe, Arizona Territory. That overdraft and collateral were sold and assigned, calculated and put into the three notes at $4,541.72, being all the claim the National Bank, appellee, held against the overdraft and collateral attached. This overdraft and collateral attached was sold and assigned, and the three notes taken in full payment therefor without recourse on The Phœnix National Bank, appellee, and there is no dispute in this record about that part of the consideration, it especially exempting itself from liability on that part of the consideration of the three promissory notes, but there was no exemption on the part of appellee in the sale of the $5,000 note, both contracts being entered into, signed,

and delivered on the same date, November 28, 1894. This overdraft and collateral contract is not properly in the record. Appellee filed a motion in Supreme Court, Arizona, asking to be allowed to file a paper claimed to be evidence that the District Court allowed him to put in, among which is an overdraft account and a contract (See Record, pp. 104, 105), but there was no suggestion of diminution of the record and his motion was never ruled on.

Complaint.

Thereafter, and on February 21, A. D. 1896, the appellant filed a complaint in the District Court of Mericopa County, Arizona, as Case No. 2554, charging the failure of the payment of the said three promissory notes of A. J. Daggs aforesaid, and asking to foreclose the mortgage executed by R. E. Daggs, the surety, on his separate property. Thereafter, on February 25, A. D. 1896, appellee filed another suit on the same three promissory notes, asking to foreclose mortgage on one of the blocks of property on which A. J. Daggs had executed a mortgage. On the same date the appellee filed another suit on the same three promissory notes and asked to foreclose the other mortgage given by A. J. Daggs on his separate property. In neither of the three suits was the $4,000 water stocks pledged to secure the three notes mentioned, nor never offered for sale.

Answers.

To the first complaint of the plaintiff in case No. 2554, the appellants answered separately, first, by general demurrer and general denial, and afterwards, on October 12, 1896, filed amended answers. The surety, R. E. Daggs, filed his separate amended answer to appellants' first com-

plaint, in which amended answer he raised four separate and distinct propositions:

First. He charged that the three notes sued on were tainted with usury in that the interest charge of 10 per cent. on said notes exceeded the rate allowed by the National Banking Act, Sec. 5197, Rev. Stat. U. S., and inasmuch as no rate of interest was fixed by the laws of Arizona Territory, the United States Statute alone governed, and only 7 per cent. could legally be charged, and by virture therefore of Rev. Stat. U. S., Sec. 5198, applied and by reason of doing the illegal Act the appellee Bank could not enforce that part of the contract against him, and prayed that he be relieved from the payment of any interest on said three notes.

Second. The surety, R. E. Daggs, also charged that $4,000 worth of water stock had been pledged to appellee by the appellant, A. J. Daggs, the principal debtor, which stock had been converted by appellee, and no credit given for them on the three notes, and asked that the appellant be compelled to credit the $4,000 on the three notes.

Third. The securety, R. E. Daggs, further charges that at the time he gave his mortgage to secure the three notes it was understood and agreed that a certain $5,000 note, giving its description, the same heretofore described in contract No. 1, was a part of the consideration of the three notes sued on, and that said $5,000 note was in litigation, which it was contracted, should be carried on in the name and by assistance of the appellee until same should be merged in judgment and collected and applied on the three notes in satisfaction thereof, and that he gave his mortgage as securety on that understanding ; that the appellee had wholly failed to allow its name to be used, or allow the action to be carried on in any manner, and had refused to sign the bond on appeal required by law as principal, and by reason thereof he was discharged

as surety, as the property securing said note was then and thereby lost.

Fourth. That appellee had sold and assigned to his co-appellant that certain $5,000 note above described, and took in full payment therefor the three notes sued on; that at the time of the execution of the mortgage by appellant surety, it was expressly understood that appellee was liable as assignor on the $5,000 note, and upon failure to collect the $5,000 note which was then in suit, it was understood that appellant surety should not be liable for more than the difference between the $5,000 note and interest, and the three notes sued on; and further charged that the makers of the said $5,000 note at the date of the execution of the mortgage as securety by appellant, were, and ever since have been notoriously insolvent, and have no property out of which an execution could be satisfied, all of which was well known to appellee; and asked that the $5,000 note and interest be applied in liquidation of the three notes sued on, and that appellant take nothing by his suit against this appellant and for costs and for general relief.

Which answer was duly verified and filed on the 12th day of October, A. D. 1896.

Appellant, A. J. Daggs, in his separate amended answer, charged:

First. That the three notes were tainted with usury, for that appellee had charged 10 per cent. interest, wherein by the law of the land, Rev. Stat. U. S., Secs. 5197 and 5198, allowed only 7 per cent. to be charged where no rate of interest was fixed by the law of any State or Territory, and that no rate was fixed by the laws of Arizona, and that the offending appellee had committed the illegal act and forfeited its right to enforce the collection of any interest whatever on the notes; and asked judgment accordingly.

Secondly. He also sued the appellee on the $5,000 note sold and assigned to him as a counterclaim, charging that the appellees were indebted to him on the $5,000 note according to its tenor and effect (describing it); that it had been sold and assigned to him by written assignment for a valuable consideration on November 28, 1894, to wit: the three notes sued on and that they were taken in full payment therefor; that at the date of sale and assignment of said note, the makers thereof, were, and ever since have been, and are now actually and notoriously insolvent, all of which the plaintiff appellee well knew at the date of the sale; that no part of the note had been paid since the assignment; and there was now due the sum of $7,076.91 and prayed judgment against the appellee according to the tenor and effect of the said note.

Thirdly. For another answer this appellant sued appellee for breach of a written contract and upon an account, and alleged:

That appellee, by written contract (copy being attached) as part of the consideration of the three promissory notes, had sold and assigned, and expressly stipulated, that the three said promissory notes should be received in payment for all its right, title and interest, in and to that certain chose in action wherein Hugh McCrum was plaintiff, and W. A. and P. P. Daggs, as individuals and as partners, defendant; and appellee was intervenor, and D. A. Abrams, assignee of the Bank of Tempe, of Tempe, Arizona, was intervenor over that $5,000 note and chattle mortgage.

That at the time of the sale and assignment of the chose in action involving the $5,000 note and mortgage, the makers of said note were actually and notoriously insolvent, which the plaintiff well knew; that it was further agreed and stipulated that said litigation aforesaid should be carried on in the name of the appellee, until said cause should be

finally determined and settled, and that appellee should pay all costs prior to November 1, 1894, and that appellant A. J. Daggs, should pay all costs accruing thereafter. And that appellant further alleged that he had paid out $45.65, as a transcript fee from the lower court, that accrued prior to November 1, 1894, and that he had expended the sum of $500 as costs, and expended labor and work to amount of $500 and duly performed all the conditions of said contract on his part, but the appellee had failed and refused to perform the conditions of the contract on its part in this: That it had wholly failed and refused to pay the transcript fee that accrued prior to November 1, 1894, for $45.65; that it had wholly refused to allow its name to be used to carry on the suit to court of last resort; and that it had wholly failed and refused to sign the bond on appeal to damage of appellant, A. J. Daggs, in the sum of $10,122.55, and asked judgment accordingly.

Fourthly. Appellant then, for another action against the appellee, alleged that appellee had converted $4,000 worth of water stock pledged by him to it as collateral security to the said three promissory notes; that appellee had refused to give any account of the water stocks or their value, and refused appellants dominion over them, and had converted them to its own use and benefit—to his damage—in the sum of $4,000, and prayed judgment accordingly, which amended answers were duly verified and filed November 12, 1899.

Trial was had on October 12, 1896, as the pleadings stand above, before the court without a jury, there being no reply whatever to any one of appellants suits, or at all.

Appellee introduced its three notes, bearing 10 per cent. interest, and the two mortgages of appellant, A. J. Daggs, without objection, but the mortgage given by the surety was objected to on the ground it had been muti-

lated after it had been signed, which objection was overruled and exception taken, and appellee rested its case.

Appellant introduced the $5,000 note and the written contract of assignment of it to him, and offered evidence tending to prove the actual and notorious insolvency of the makers of the said note at the date of the sale and assignment, and that the appellee well knew it. This note being confessed by failure to reply.

Appellant, on the breach of contract, proved that the appellee had refused to carry on the said suit, or allow its name to be used to carry on the suit, and it admitted that it had refused to sign the appeal bond, one of the papers on appeal, to carry on the suit, the note ($5,000) was in to prove the damages. Appellant, on conversion, proved that appellee had refused to recognize the rights of appellant to water stocks of the value of $4,000, and refused to allow the exercise of the right in the canal to the water stock, and refused dominion over the stock, and refused to foreclose or sell the stock, and claimed to own them; but on the trial, said by its counsel, that to refute the allegation of conversion it would deposit the water stocks in the clerk's office, and when the debt was paid they would return them to the appellant.

The surety relied on the same evidence to show his burdens increased, and likewise his release on his contract of suretyship.

He also offered to prove that it was agreed between the surety and appellee that the $5,000 note, when collected from the McCrum suit, should go to liquidate the three notes in suit, and should that suit fail, then credit should be given on the three notes for the $5,000 note and interest. This offer to prove was by the court denied.

Before the trial begun on October 12, 1896, the appellants moved the court to bring in Thompson Walker, *et al.*, parties having or claiming an interest in the prop-

erty, which motion was by the court overruled. After the trial had been continued, at the request of the appellee, over the objection of the appellant, the following papers were filed:

Appellee supplemental complaint. In which it charged that it had purchased four tax sale "certificates," and alleged that such certificates were a lien on the mortgaged property, and asked judgment and foreclosure of lien for same. Filed October 16, 1896.

To which supplemental complaint appellant moved to dismiss on ground of no notice, and objected by general demurrer that the supplemental complaint did not state a cause of action, and also filed a general denial. Filed October 24, 1896.

Which motion and demurrer was on the 25th day of October, 1896, overruled and exceptions taken.

On October 24, 1896, the appellants filed motion for judgment on the pleadings for the reason that the counterclaim was confessed; that no reply had been made to the counterclaim and no answer at all.

Which motion was overruled on October 26, 1896, and exceptions taken, and the court gave the appellee thirty minutes to file a reply and the following reply was filed:

Appellee singled out the counterclaim as shown by the pleadings, which called the action on the $5,000 note a counterclaim, the other actions not using that designation, and filed its reply by general demurrer that counterclaim did not state cause of action, and also by general denial to the same counterclaim its demurrer was overruled by the District Court.

The point is that an unverified general denial is no reply to a varified counterclaim on a promissory note and that even after this kind of reply the $5,000 note stood confessed on the pleadings as well as proved in the record and there was no issue on it to be tried. Having singled

out this counterclaim, left the other verified actions without any reply whatever, and the trial again proceeded over the objections of the appellant, A. J. Daggs, who made his objection throughout that there was no reply; and there was no issue be be tried as made by the pleadings, which was as often as made, so often overruled. Exceptions taken.

A second trial was had October 27, 1896, whereupon the cases No. 2554, 2555, and 2556 were consolidated by agreement in open court, and that the evidence in case No. 2554 should be considered all the evidence under objections in the other two cases, and that the notes, mortgages, and tax receipts, evidence of payment of taxes in cases Nos. 2555 and 2556, should be considered in evidence under objections as they stood on the record.

Judgment was rendered October 12, 1896.

Motion for a new trial was made and filed on October 14, 1896, and overruled March 20, 1897, whereupon case taken by writ of error to the Supreme Court of Arizona Territory, where the judgment of the lower court was affirmed on different grounds, and an appeal taken here by allowance of appeal by a justice of this court June 6, 1899.

Amended Assignment of Error.

Come A. J. Daggs and R. E. Daggs, the appellants above named, and defendants, and respectfully say that there is manifest error in the record and proceedings in the above entitled cause, in this, to wit:

The court erred in affirming the judgment of the court below for the following reasons:

Assignment of Errors.

ERROR NO. I.

The court below erred in holding and decreeing that a national bank could charge, reserve, and collect any rate of interest whatever on any contract in the Territory of Arizona, where no rate of interest is fixed by law; and that the making of such a contract was not *ultra vires*. It should have held that a national bank could not charge, reserve, or collect a rate of interest to exceed the rate of 7 per cent. in Arizona Territory, and if it did charge a rate in excess of 7 per cent., it forfeited its right to collect any interest on that contract in any manner or at all; and the appellee having charged the rate of 10 per cent. per annum on the contract sued on in this case, it had forfeited its franchise right to collect any interest whatever on the notes in this suit.

ERROR NO. II.

The decree is further erroneous and the court below further erred in holding and decreeing that in effect there was a rate of interest fixed in Arizona Territory at 7 per cent., without further holding that a national bank was limited to that rate, and the appellee having charged a rate of 10 per cent. per annum on the contract sued on, had forfeited its franchise right to collect any interest whatever on the notes sued on. It should have held that there was no rate of interest fixed by the laws of Arizona Territory, and that a national bank could not charge to exceed the rate of 7 per cent. per annum on any contract in Arizona; and having charged a rate of 10 per cent. per annum it had forfeited its right to collect any interest in this case.

ERROR NO. III.

The court below further erred in holding and decreeing that the appellants' counterclaim in this case based on the $5,000 note, did not state facts sufficient to constitute a cause of action, for the reason that appellants did not allege in their bill that due diligence had been used to collect the said note from the makers thereof. The court below should have held that the counterclaim based on the $5,000 note did state a cause of action, because it is expressly alleged in such bill that the makers of the said note are actually and notoriously insolvent, and were so at the date of the sale and assignment of the said note, which was well-known to the appellee; and proceedings against them would be more than useless, which allegation took the case out of the operation of the requirement of the due diligence statutes. It should have held also that suit had been prosecuted against the makers of the said note by appellant in the name of appellee to the Supreme Court of Arizona, where the same was lost and nothing recovered against the makers of the said note or from the foreclosure of the mortgage securing the same, and that no further diligence was required of the appellants.

ERROR NO. IV.

The court below erred in not holding and decreeing that the counterclaim of the appellants based on the $5,000 note sold and assigned to them by appellee, stated a cause of action properly alleged, duly verified and also proved by appellee, and should have given judgment in favor of appellants and against the appellee, according to the tenor and effect of the said note.

ERROR NO. V.

The court below further erred in holding and decree-

ing that the view taken by it was strengthened because the appellants' bill stated on the face of the note the phrase, "Secured by chattel mortgage of even date herewith," for the reason that it is expressly alleged by the appellants, and shown in the record, that the makers of the $5,000 note were at the date of the sale and assignment, and are now, actually and notoriously insolvent, and the appellee well knew this fact; and it is also alleged in the pleadings in this case, and proved in the record, that a suit was pressed by appellant in the name of appellee against the makers of the said note, and to foreclose the mortgage covering the property mentioned in the said phrase, to final hearing in the Supreme Court of Arizona Territory; and in that case in that court judgment went against the appellee and the property was lost and the appellee refused to follow the suit further, and no further diligence could be used, and appellants are suing the appellee as one of their counterclaims in this suit for the breach of its contract, causing a loss of that very property, and in refusing to carry on the suit against the makers of the said note.

ERROR NO. VI.

The court erred in not remanding the cause to the District Court when the court below reversed the action of the District Court in overruling the appellee's demurrer to the appellants' counterclaim on the $5,000 note; and in affirming the judgment for the reason that the Supreme Court of Arizona thereby defeated the right of appellants to amend their bill by an insertion of an allegation showing that due diligence had been used. For that should the appellee's demurrer been sustained, instead of overruled by the District Court, appellants could and would have amended their complaint by the insertion of an allegation that judgment had been recovered and execution

issued against the makers of the $5,000 note and the execution has been returned *nulla bona* and wholly unsatisfied.

ERROR NO. VII.

The court below erred in holding and decreeing that the appellee recover judgment on its supplemental complaint, for the reason that neither of said supplemental complaints state facts sufficient to constitute a cause of action against appellants, or either of them, for the reason that neither of said complaints allege or show that the so-called tax sale certificates were ever filed with the Court Recorder so as to become a lien on the property mortgaged.

ERROR NO. VIII.

The court below erred in not holding and decreeing judgment in favor appellants and against the appellee for damages on account of breach of written contract, wherein appellee agreed to pay costs of the suit mentioned in said contract prior to November 1, 1894; and in refusing to sign the bond on appeal to the Supreme Court of the United States, and which it confessed as follows (during the trial counsel for appellee, Mr. Eugene S. Ives, in open court, said): "We admit we refused to sign your bond." And also in refusing to allow its name to be used in carrying on the suit over the $5,000 note and for foreclosure of the chattel mortgage securing the same, by reason of which the chance to recover the property covered by the said mortgage and the same property mentioned in the phrase on the note, "Secured by chattel mortgage of even date herewith," was lost to appellants and the $5,000 note thereby rendered worthless.

Error No. IX.

The court below erred in not holding and decreeing judgment in favor of the appellants and against the appellee on the appellant's action, based on the conversion by appellee of the $4,000 worth of water stock held by appellee as collateral security to the three notes sued on, for the reason that such cause of action was properly stated, duly verified and proved by legal and proper evidence; and no answer was made thereto. The court should have given judgment in favor of the appellants for the full amount of this claim, the conversion being admitted by Mr. Eugene S. Ives, counsel for the appellee, in open court, as follows: "A creditor can pursue whatever security he may have, there is an answer here, and under the answer of A. J. Daggs, it is to the effect that we have converted these water rights. We are ready to deposit these with the clerk, and, after our notes are paid and satisfied, they may be delivered; if not satisfactory they may be returned to us. We make that offer to do away with the allegations of conversion. We have a perfect right to pursue any course we please, but we are perfectly willing to deposit them with the clerk of the court, and, in case this property satisfies our note, they will be returned to the parties."

Error No. X.

The court below erred in not holding and decreeing that appellant, R. E. Daggs as surety, was discharged from any and all liability on the three notes sued on; for the reason that appellee had breached its written contract with appellant, A. J. Daggs, to carry on the suit by it against the makers thereof, wherein the chance to recover the property securing the $5,000 note was lost and the note rendered worthless as against the makers, and in

breaching its contract, pay the transcript fee that accured prior to November 1, 1894, and for the further reason that appellee refused to give credit on the three notes sued on for the value of the $5,000 note; and for the further reason that appellee converted to its own use and benefit the $4,000 worth of water stock pledged as collateral by appellant, A. J. Daggs, the principal on the three notes and refused to give credit therefor.

ERROR NO. XI.

The court below erred in not rendering judgment for the appellant and against the appellee upon the appellant's motion for judgment, and in overruling the said motion, said motion should have been sustained on the ground set forth in said motion, to wit: "Because the counterclaims are confessed by the plaintiff (appellee); second, because there is no reply to the defendants' (appellants') counterclaims."

ERROR NO. XII.

The court below erred in overruling appellants' motion suggesting a defect of parties and asking that appellee bring in Thomas Walker, P. B. Carley, J. H. Guyer, Henry Schmidy, W. H. Nye and Thomas Argue, who have, or claim to have, some interest in the mortgaged property, to the end that the title of the mortgaged property might be cleared. The court should have sustained said motion.

ERROR NO. XIII.

The court below erred in not holding and decreeing that the $5,000 note sold and assigned by appellee to appellant, and calculated in as part of the consideration of the three notes sued on, had been rendered worthless by

the appellee and that part of the consideration of the three notes had failed.

ERROR NO. XIV.

The court below erred in affirming the judgment of the District Court in this: that it foreclosed the mortgage given by the surety, R. E. Daggs, on all the north one-half of the south-west quarter and the south one-half of the north-west quarter and the north-west quarter of the north-west quarter of section 10, Township 1 north, Range 5 east, of Gila and Salt River base and meridian without further description, for the reason that said property is not described in any county, State or Territory and has no status.

ERROR NO. XV.

The court erred in refusing to allow the surety to prove his complaint and excluding the following evidence:

Question. "You may state, Mr. Daggs, the agreement upon which you mortgaged your property as security for A. J. Daggs, appellant."

"Plaintiff objects to the question."

By the Court: "What is the purpose of this?"

By Mr. Daggs: "The defendant offers to show by this witness that he gave the mortgage on his property to secure the payment of these three promissory notes upon the express agreement with James A. Fleming, president of the Phœnix National Bank; that the litigation over the $5,000 note assigned to A. J. Daggs should be carried on in the name of the Phœnix National Bank and pressed to judgment and settlement, and, when the money in the litigation was obtained, it would go to liquidate and satisfy the three promissory notes sued on, for which he gave his mortgage to secure."

" Plaintiff objects to the question."

" Objection sustained."

" Defendant excepts."

By Mr. Daggs: " The defendant offers further to prove that if the note was not collected that it should be returned and the full amount of it turned and credit given on the three promisory notes and that R. E. Daggs should not be liable for any more than the difference between the $5,000 note and interest, and the three promissory notes sued on."

" Plaintiff objects to the offer to prove."

" The objection sustained."

" Defendant excepts."

Error No. XVI.

The court erred in admitting the mortgage executed by the surety, R. E. Daggs, over the following objection: " Defendant objects to the introduction of the mortgage on the ground that it has been mutilated after it had been signed."

" Objection overruled and defendant excepts."

" The same is duly admitted and marked Plaintiff's Exhibit F. The full substance of the portion of the mortgage evidence claimed to be illegal is as follows: (After setting forth the following description,) " also all the north one-half of the south-west quarter and the south one-half of the north-west quarter and the north-west quarter of the north-west quarter of section 10, Township 1 north, Range 5 east, of Gila and Salt River base and meridian." Following this description is the mutilation complained of: " Containing in all two hundred acres more or less, with all water rights or shares thereto appertaining situated, lying and being in Maricopa County, Arizona Territory, with all water rights thereto apper-

taining." (Which was erased by pen scratches through it.)

ERROR NO. XVII.

The court erred in admitting the following oral testimoney concerning the contents of the written contracts No. 1 and 2, over the objection of the appellants under the notice marked C. H. H., as said notice in nowise shows what instruments are referred to and contains no description of any instrument and that the said evidence disputes the written contracts.

Notice C. H. H. is as follows:

PLAINTIFF'S EXHIBIT C. H. H.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE TERRITORY OF ARIZONA, IN AND FOR THE COUNTY OF MARICOPA.

2554, 2555, 2556.

Phœnix National Bank,
Plaintiff,

vs.

Daggs, *et al.*,
Defendants.

To A. J. Daggs, Attorney for defendants:

Please take notice that you are hereby required to produce upon the trial of the above-entitled actions all papers, bills of sale, assignments, promissory notes, letters, and memoranda affecting the issues in the above-entitled actions, or relating to the circumstances thereof, which are in the possession, or under the control of yourself or the defendants, or any of them, and in default of your produc-

ing such papers the plaintiff will introduce parole testimony as to the contents thereof.

L. H. Chalmers and Eugene S. Ives,
Att'ys for Plaintiff.

Under the above notice the court allowed the following oral evidence over objection to be introduced :

MR. L. H. CHALMERS,

a witness duly called, sworn according to law and examined upon his oath, testified as follows :

Examination by Mr. Ives.

Q. Were you the attorney for the Phœnix National Bank pending the negotiations resulting in the execution of the notes, which are the subject-matter of this action ?

Defendants object to the introduction of any further testimony in this case by this witness pertaining to their litigation, for the reason that there is no issue between the defendant A. J. Daggs and this plaintiff.

Objection overruled by the court and defendants except.

Mr. Ives. We want to put in evidence the notice to produce papers that I have served on the attorney for the defendants.

By the Court : Very well.

By the reporter : I have forgotten the number of exhibits already offered in this case, but will identify this with my own initials. Same was thereupon duly admitted and identified as plaintiff's exhibit C. H. H.

By Mr. Ives : I have asked that they produce the assignment by the Phœnix National Bank to A. J. Daggs of certain notes, which, together with the note which has been discussed before your Honor, form the consideration for the three notes, the subject-matter of the suit.

The one note which they set out as a counterclaim was a part of the consideration for the three notes which we are suing on. This bill of sale transferred other securities

which we have. One note formed all of the consideration and I have asked them to produce the original bill of sale delivered to them at that time ; and I now again ask them and they refuse to produce it, and I ask the court to allow plaintiff to prove the contents of it by this witness.

By the Court: Very well, go ahead.

A. By Mr. Chalmers: With respect to the contents of that bill of sale—

(Interruption) Defendants object to their proving the contents of that (contract of sale) notice because their notice is not a sufficient notice to produce papers as in the case of ——— v. ——— (Counsel for defendants reads authority to the court, whereupon the court overruled the objection and defendants except).

By Mr. Daggs: I object to the introduction of that testimony, for the reason that it is secondary evidence,and because no notice as required by law has been served upon the defendants, further, that there is no issue upon that proposition.

We admit that part of the consideration—there is no issue about that part of the consideration, why now are they entitled to produce the evidence before this court?

Objection overruled and defendants except to the ruling of the court.

Q. Do you know any addition, Mr. Chalmers, to the agreement in evidence between the Phœnix National Bank and A. J. Daggs, with respect to the McCrum matter? Was there any other paper in the nature of a bill of sale or assignment that was delivered by the Bank to A. J. Daggs?

Witness. Yes, sir. Generally I know the contents thereof. There was a copy of it made at the same time, and that paper is in my possession.

Plaintiffs offer the same in evidence.

Defendants object to the introduction of the copy as the original is the best evidence·

By the Court: Have you it with you?

A. I have.

Q. Allow me to see it?

Continued by the Court: That calls for three notes, $7,000, $4,000 and $3,000—made by A. J. Daggs to the order of R. E. Daggs. Did you ever see those notes?

A. Yes, sir. When they were in the possession of the Phœnix National Bank the endorsement of R. E. Daggs was on them.

Mr. Ives: Certain water rights were given as collateral security for the three notes, subject-matter of this suit?

A. Yes, sir.

Defendants object to the question as leading.

Witness: At the time when those notes and mortgages signed, I know what was the condition of the title to these water rights.

Defendants object to this testimony as immaterial.

Objection overruled, exception taken.

Witness: There was litigation affecting them; and the Phœnix National Bank was aware of it when it accepted them as collateral security. It took them at this time subject to the knowledge of the litigation.

Defendants object to the testimony as immaterial.

By the Court: When that was signed and delivered, who got it?

A. This is a part of and contemporaneous with the assignment that all of this talk has been about. In the settlement—the settlement was a general clean up of all the stuff the Phœnix National Bank held against the Daggs, and the bank agreed to give them back everything that they at that time held and took these three notes with the water rights in consideration of it.

The Daggs had previously drawn a contract up where they claimed a guarantee and I had drawn up this, covering all the other notes.

By the Court: That refers to the other three notes, but not to this $5,000 note?

A. No, sir, it refers to all the other stuff.

By the Court; Then that exhibit can be admitted and filed in the other case. (Same heretofore identified as C. H. H.)

Mr. Ives: That is all.

ERROR NO. XVIII.

The court erred in proceeding with the second trial of the cause on October 26, 1896, and the whole thereof over the objection of the appellant, A. J. Daggs, for the reason that no reply having been filed to the verified causes of action there was no issue to be tried under the theory of the pleadings.

ERROR NO. XIX.

The court erred in not sustaining the objection of the appellants to the so-called statement of facts, as follows: "Comes R. E. Daggs and A. J. Daggs and files this their exceptions and objections to the so-called 'Statement of Facts in the Nature of a Special Verdict'" on the following grounds:

1. Because said statement is not a statement of facts and is not based on the evidence in the case.

2. Because said statement is not a compliance with Sec. 1868 R. S. U. S., and the amendment of April 7th, 1874.

3. Because the court refused to make a statement of facts or to make and certify to the rulings on the evidence, or to pass on the motion to have the same made, certified and filed *nunc pro tunc* and refused to adopt the statement and objections and exceptions to evidence as prepared by appellants and tendered the court, which appellants now again herewith tender and ask to have the same adopted and filed as a part of this record.

4. Because the full record of the evidence containing all the evidence was on file in this court as a part of the record in this case, and the court refused to make a statement of facts in the case from such record or in accordance with such record, or to adopt statement prepared and herewith again tendered, and filed as part of the record in this case.

5. Because the assignment of error set out in said findings is not the assignment set out in appellants' brief as it purports to be.

Dated this 1st day of November, 1899.

ERROR NO. XX.

Because the so-called statement of facts made by the court below will not, and does not, sustain the judgment and is not a statement of fact in the nature of a special verdict.

ERROR NO. XXI.

The court erred in not adopting the statement of facts tendered by the appellants, for the reason that the same is a true and correct statement of the facts of the case in the nature of a special verdict.

And whereas, by the law of the land, the said judgment ought to have been given for the said appellants and against the said appellee, the said appellants pray the judgment aforesaid be reversed, annulled and altogether held for nothing, and that they be restored to all things which they have lost by occasion of the said judgment, and that they have judgment in their favor upon the whole case according to their counterclaims and according to the right and justice of the case.

Brief and Argument.

We shall argue the case in the order of the amended assignment of error.

ERRORS I AND II ARGUED TOGETHER.

It is admitted on the face of the pleadings that appellee has charged 10 per cent. per annum interest on the three notes sued on, and judgment has been rendered therefor by the court below. This is assigned as error. Appellants contend that under the National Banking Act, U. S. Sec. 5197 and 5198 and under the laws of Arizona Territory, the appellees cannot receive, reserve, or charge on any loan, note, bill of exchange, or other evidence of debt, interest at a greater *rate* than 7 per cent. per annum, that much and *no more.*

The interest laws of Arizona Territory and the whole thereof are as follows: Page 338, Title XXXVIII Interest. Approved March 10, 1887. Rev. Stat. A. T. Par. 2161 Sec. 1. "When there is no express agreement fixing a different rate of interest, interest shall be allowed at the rate of seven per cent. per annum on all moneys after they become due on any bond, bill, promissory note or other instrument in writing, or any judgment recovered in any court in this Territory for money lent, for money due on any settlement of accounts, from the day on which the balance is ascertained and for money received for the use of another."

Par. 2162, Sec. 2. "Parties may agree in writing for the payment of any rate of interest whatever on money due or to become due on any contract; any judgment rendered on such contract shall conform thereto, and shall bear the rate of interest agreed upon by the parties, and which shall be specified in the judgment."

The first paragraph (2161) of this statute of the Territory of Arizona allows 7 per cent. interest on contracts

after they become due, where no rate has been fixed by the contracting parties. Under this section there is no limitation, no rate fixed above which parties cannot contract.

Paragraph 2162, Sec. 2, allows parties to contract for any rate of interest whatever, there is no limitation, no rate fixed above which they cannot go. Under this law the notes sued on were contracted.

If there is a rate fixed by these statutes it is 7 per cent. because that is the only *rate* of interest therein mentioned. If this is true, and the appellee having charged 10 per cent. it follows that the appellee has charged more than the rate allowed by the Territorial law of 7 per cent. and hence has committed the usurious act under the U. S. banking law and forfeited its right to collect any interest whatever on the notes sued on.

If there is no rate fixed by the Territorial law then the United States statute furnishes the complete answer and says where no rate is fixed by the laws of the Territory, then the National Bank can charge only 7 per cent. per annum ; and having charged 10 per cent. per annum has committed the act of usury and the penalty is that it has forfeited its franchise right to collect any interest on the three notes in suit.

Revised Statutes of the United States, Pars. 5197 and 5198.

The doctrine then is, where there is a rate of interest fixed in any State or Territory the national bank can charge the rate so *fixed* and *no more*. But where no rate is fixed, a national bank can charge just what its charter provides, 7 per cent., and no more, and if the national bank violates either view of the law, it forfeits its franchise right to collect interest. The doctrine thus announced is already settled in this court in favor of appellants.

A case on "all fours" will be found in National Bank v. Johnson, 104 U. S., 271, where the case of Tiffany v. National Bank of Missouri, 18 Wall, 412, is commented on and explained in favor of the above doctrine.

An analysis of Sec. 5197 and 5198 will be found in Farmers and Mechanics National Bank, 91 U. S., 32, where the same doctrine is announced.

In Danforth *et al.* v. National Bank of Elizabeth, 48 Federal, 271, it is said of Par. 5197 and 5198: "The clause operates directly upon the bank and effects its power. The statutory franchise to recover interest is lost by the commission of the illegal act. Being without power to demand interest, the offending bank cannot recover interest from any one."

Brown v. Marion National Bank, 169 U. S., 416.
Johnson v. National Bank of Gloversville, 74 N. Y., 499.
Hall v. National Bank Banne, 15 Fed. Rep., 432.
In Re Wied, Fed. case 17,645, 11 Blackford, 243.
National Bank of Madison v. Davis, Fed. case 10,038.
First National Bank v. Duncan, Fed. case 4,804.
Peterbourough National Bank v. Childs, 130 Mass., 519; 133 Mass., 248.
Croker v. First National Bank, Fed. case 3,397, 8 Bis., 103.
1 Thompson, National Bank case 350.
Central National Bank v. Pratt, 115 Mass., 539.
Tomblin v. Higgins, 53 Neb., 92.
National Bank v. Lewis, 81 N. Y., 15.
National Bank of Lafayette County v. Dusbane 96 Pa. St., 340.
Shafer v. First National Bank, 53 Kan., 614.
First National Bank v. Stauffers, 1 Fed. Rep., 187.
Alves v. Henderson Nat. Bank, 89 Ky., 126.
Boener v. Bank, 90 Texas, 443.
Smith v. Shelton, 90 Texas, 447.
Farmers' Bank v. Hale, 59 N. Y., 53.

National Bank v. Eyre, 52 Iowa, 114.
Merchants' and Farmers' Nat. Bank of Charlotts v. Meyers, 74 N. C., 514.
Union National Bank v. Louisville Ry. C., 145 Ill., 208.

Many other cases might be cited on same point.

Again we are aware that in certain quarters of the West a contrary doctrine seems to have sprung up, upon which the court below rested its decision.

Hinds v. Marmalego, 60 Cal., 229.
Bruhn v. Bank, 64 Texas, 152.
Gould v. Bank (S. D.), 57 N. W. Rep., 499.
Packwell v. Bank (Colo. App.), 36 Pac., 905.

An examination of all these cases show that they are based on each other, and then all based on a conclusion jumped at by them, purporting to find countenance in the case of Tiffany v. National Bank of Missouri, 18 Wall., 412, where it was said by this court that where the statute had fixed two rates, one for banks of issue and a higher rate fixed for natural persons, that the national bank could charge the higher rate so fixed, because the higher rates so fixed was the rate allowed to natural persons. These Western courts jumped at the conclusion that if a natural person can contract for any rate, so can a national bank and cite Tiffany v. National Bank of Mo., *supra*, as authority.

This court has cleared the mists away from this conclusion in National Bank v. Johnson, *supra*, by the use of this language about the case of Tiffany v. National Bank, *supra*. The "sole particular in which national banks are placed on an equality with natural persons is as to the *rate* of interest and not as to the character of the contract they are authorized to make, and that rate thus ascertained

is made applicable to both loans and discounts, if there be any difference between them." "It is not intimated or implied that if in any State a natural person may discount paper without regard to any rate of interest fixed by law, the same privilege is given to national banks. The privilege only extends to charging some *rate* of interest allowed to natural persons which is fixed by the State law."

The most subtile of the lot is the California case 60 Cal., 229, where an attempt is made to construe the United States Statute in the light of the local statutes, and say the word fixed in the U. S. Statute is to be construed as meaning the same as allowed. Its fallacy is easiest exposed by placing the word allowed in the sentence where fixed appears, "where no rate is *allowed* by the laws of the State or Territory * * * the bank may take * * * seven per centum." This would leave the national bank as the only party allowed to collect interest in such State or Territory.

These western authorities exposed and out of the way leaves our position on this point unchalenged by authority and we believe correct.

The three following assignments of error will be argued together, III, V and VI.

These three assignments will be argued together as they cling around the demurrer used by the court below of its own motion to strike down the counterclaim of appellants based on the $5,000 note.

It must not be overlooked that the appellee struck at this counterclaim with the same demurrer in the District Court (Record, page 46), the complaint was held good in the District Court.

The court below assumed a theory not made by the pleadings of appellant on the $5,000 note as a counterclaim and then struck the counterclaim down, because under the theory thus assumed, the bill did not state a cause of action.

Its theory assumed was that appellant was attempting to hold the appellee as a *surety* on the $5,000 note, when the appellants bill shows the suit is leveled at appellee as a principal under a different statute and a different theory. The body of the complaint (omitting formal part), is (Record, page ~~2~~ 24 and 5), as follows:

This defendant, for another answer and counterclaim to plaintiff's comp aint, alleges:

First. The plaintiff is indebted to this defendant upon a certain promissory note executed by W. A. and P. P. Daggs, as co-partners, and by W. A. and P. P. Daggs, as individuals, and delivered to Thomas Armstrong, Jr., and assigned by said Thomas Armstrong, Jr., in blank to the plaintiff, and said note was on the twenty-eighth day of November, A. D. 1894, for a valuable cons deration in writing, assigned by the plaintiff to this defendant, and at the date of said assignment the makers of said note were, ever since have been, and are now notoriously insolvent; all of which plaintiff well knew; which note is in words and figures as follows, to wit, marked "Exhibit A," and made a part hereof:

No. 1340. Due Sept. 1st.

$5,000.00. PHŒNIX, ARIZONA, *July 1st*, 1893.

On the 1st day of September, 1893, without grace, we or either of us, for value received, promise to pay to Thos. Armstrong, Jr., at the Phœnix National Bank, at their office in Phœnix, Arizona, five thousand dollars ($5,000.00) in the United States gold coin, with interest, at the rate

of 1 and ¼ per cent. per month, until paid. In case of legal proceedings hereon we or either of us agree to pay ten per cent. of amount due hereon as attorneys fees.

W. A. and P. P. DAGGS.

Secured by chattel mortgage of even date herewith.

W. A. DAGGS.
P. P. DAGGS.

And endorsed on the back as follows: "Thos. Armstrong, Jr. Sept. 30th, 1893, interest from July 1st to Oct. 1st, 1893, $187.50. Dec. 30th, 1893, interest from Oct. 1st, 1893, to Jan'y 1st, 1894, $187.50. April 2nd, 1894, interest from Jan'y 1st, to April 1st, $187.50."

Second. And no part of said note has been paid since the said assignment by the plaintiff to this defendant, and there is now due thereon the sum of seven thousand and seventy-six and 91–100 dollars ($7,076.91).

Wherefore the defendant prays judgment against the plaintiff for the sum of seven thousand and seventy-six dollars and 91-100 ($7,076.91) and costs of suit, the value of said note and interest thereon according to the tenor and effect of said note.

It is seen this complaint ignores the idea of a surety. Ignors the idea of due diligence to fix the liability of a surety, but sues the appellee as a maker of this note on the theory that the makers were notoriously insolvent, which appellee well knew when appellee assigned the note and appellee become by its assignment *ipso facto* principal on the note, and the question of suretyship and due diligence was never in this case. The question is not whether an assignor of a solvent note or chose in action under the statutes of Arizona, can be held as a surety without due diligence to collect such note from the maker or chose in action. But the question raised by

this complaint is: Is the assignor who assigns an insolvent note, well knowing it to be insolvent, liable on his assignment as a maker, as the principal; is it his debt?

Under the latter theory this bill was drawn, that it was the debt of the assignor at the moment of assignment and by virtue thereof. It was its credit that gave the note life. Its credit gave the note commercial activity. Appellees assignment transformed this non-negotiable note from insolvent to solvent paper.

The sections of the Arizona Statute governing the theory under which this bill was drawn and governing such contracts are as follows:

Art. 122. "The obligor or assignee of any written instrument, not negotiable by the law merchant, may transfer to another, by assignment, all the interest he may have in the same."

Art. 126. "Assignors indorsers and others not primarily liable upon any of the instruments named in this title, may be jointly sued with his principal obligors or may be sued alone in the cases provided for in "sections thirty-nine and forty of acts concerning proceedings in civil suits."

Section 40 of acts concerning "proceedings in civil suits" is as follows:

Art. 788, Sec. 40. "The assignor, indorser, guarantor and surety upon any contract, and the drawer of any bill which has been accepted, may be sued without the necessity of previously or at the same time suing the maker, acceptor or other principal obligor, when he resides beyond the limits of the Territory, or in such part of the same that he cannot be reached by the ordinary process of law, or when his residence is unknown and cannot be ascertained by the use of reasonable diligence, or when he is dead, or actually or notoriously insolvent."

The latter section controls the remedy to reach an as-

signor when the maker of a note is insolvent, the words "without the necessity of previously, or at the same time, suing the maker," give the right where any of the following conditions exist regarding the maker of note.

1st. "Where he resides beyond the limit of the Territory."

2d. "Or in such part thereof that he cannot be reached by the ordinary process of law."

3d. "Or when his residence is unknown and cannot be ascertained by use of reasonable diligence."

4th. "Or when he is dead."

5th. "Or actually insolvent."

6th. "Or notortiously insolvent."

Notorious insolvency existed at time of assignment. There was nothing left to be done to complete the right to sue the assignor. The contract (Record, p. 69, Defendant Ex. 1) shows the makers of the note were insolvent. They could not pay their notes, three suits in court foreclosing three mortgages each seeking priority, hanging to them like millstones grinding them to dust. Appellee had lost its reputed first mortgage in the District Court and appealed. It then sold this note and litigation; the contract shows this (Record, p. 69), and agreed to stand up and carry the suit on in its name. The case was tried in the Supreme Court of Arizona and held adversely to the appellee in appellants' suit against the makers of the $5,000 note (Record, p. 62). The appellee then fell down and refused to let its name be used any farther to carry on the suit, refused to sign the bond, and would have nothing more to do with the suit (Record, pp. 60, 61, 62, 131), where Mr. Ives, counsel for appellee, said, "we admit we refused to sign your bond." Appellant then demanded payment of the $5,000 note, and was refused (Record, p. 63). Appellant spent over $500 in money and $500 in services prosecuting the makers of the $5,000 note (Record, pp. 59, 60, 123); followed it to the Supreme Court

of Arizona, and would have went further, but appellee refused to let its name be used and he was compelled to stop. Appellant then demanded credit for the $5,000 note (Record, p. 63). How much more diligence would the court below have, possibly have the debtors bodies taken in execution? With all this record before it the lower court say no diligence was used to collect. We say all the law requires, even on the theory of the lower court, all that a reasonable man would do, was done. The lower court would have the appellants now bring a suit against the makers of this note, and re-dragnet the dregs of insolvency, to satisfy its conception of due diligence.

The mortgage in this litigation was the same as mentioned in the phase on the note (Record, page 64), when appellant had exhaused all good faith he sued the national bank, on whose guarantee he relied at the date of sale and assignment. (See Record, pp. 63 and 64.)

That there was property under the chattle mortgage that could it have been reached would have possibly satisfied the note, but in the suits to establish the priorities of mortgages between three different ones the national bank lost and then fell down and refused to go further and left appellant. (Record, page 64.)

Insolvency of the makers did not happen then, it had happened long before the assignment. The makers could not pay appellee, simply the last chance to reach the property mentioned on the note was exhausted, other mortgagees got it.

Due diligence was used by suit. The last vestige of property was beyond reach. The makers were notoriously insolvent. And under Art. 788, Sec. 40, Revised Statutes of Arizona, *supra*, the appellants founded their cause of action. They also sue here for breach of the contract for failure of appellee to allow their name to be used in carrying on the suit, and for their money back for carrying on the suit. All this was before the court below.

Appellants contend further that their theory is not only correct under the statute but that it is the settled law of Arizona Territory, that when the allegation of insolvency is made it takes the case out of the operation of the line of decisions requiring due diligence to collect it from the maker, and no allegation of due diligence is required and that no demurrer will reach it on that ground.

These statutes were adopted from Texas, in 1887, verbatim. as follows;

Art. 266. "The obligee or assignee, of any written instrument not negotiable by the law merchant, may transfer to another, by assignment, all the interest he may have in the same."

Art. 270. "Assignors, indorsors and others not primarily liable upon any of the instruments named in this title, may be jointly sued with his principal obligors or may be sued alone in the cases provided for in articles 1207 and 1208."

Art. 1208. "The assignor, indorser, guarantor and surety upon any contract, and the drawer of any bill which has been accepted, may be sued without the necessity of previously or at the same time suing the maker, acceptor or other principal obligor, when he resides beyond the limits of the State, or in such part of the same that he cannot be reached by the ordinary process of law, or when his residence is unknown and cannot be ascertained by the use of reasonable diligence, or when he is dead, or actually or notoriously insolvent."

Rev. Stat. Texas, 1879.

This Act was first passed in 1840, while Texas was yet a Republic, and when Texas, in 1845, became one of the States of the Union it retained its statute.

Laws of Texas, Vol. 4, p. 144.
Act. January 25, 1840.

It reappears in Paschals digest of 1873, Art 771, 772, was revised and reappears in the form above quoted in Revised Statutes of Texas, 1879, and was adopted by Arizona in 1887. Again under Texas decisions.

The demurrer of the court below admits the bill, and must survive or perish on the theory of the bill and on no other theory.

By an unbroken line of decisions in Texas for nearly 60 years, the Supreme Court of Texas has held that the allegation of insolvency takes the case out of the operation of the line of decisions requiring due diligence, and that a bill, alleging actual or notorious insolvency, is good against a demurrer, on the ground it did not state facts sufficient to constitute a cause, for the reason due diligence was not alleged.

The Supreme Court of Texas and the Court of Appeals of Texas have concurred in the same view in holding that the allegation of insolvency takes a case out of the operation of the due diligence statute. That when the maker is or becomes insolvent the assignor is thereby rendered primarily liable. He becomes the principal debtor. It is his debt, and no allegation of diligence is necessary.

In Texas Court of Appeals civil case, Johnson v. McDonald, 1 White & Wilson, 576, case No. 1013, it is held: "It is well settled that if the makers are notoriously insolvent the indorser is primarily liable and may be sued at any time before the cause of action is barred."

In Insoll v. Robson, 16 Texas, 128, was a case where insolvency had been alleged and a demurrer in the district court sustained, because the bill did not state cause of action, for that it was not alleged that due diligence had been used to collect the note from the makers. The averment was that the maker was at the time of the endorsement and ever since notoriously insolvent, and the Supreme Court of Texas said, per Wheeler, J:

"The assignor, or indorser, may be sued without the necessity of previously suing the maker when he is 'notoriously insolvent.'

"If the insolvency of the maker will dispense with the necessity of suing him at all, in order to hold the indorser liable, it, of course, must dispense with the necessity of suing him at the first term of the court. It is the suing of the maker which fixes the liability of the indorser unthe statute; and where that is unnecessary, it cannot be necessary to sue the indorser himself to the first term, in order to fix his liability. The deligence prescribed by the statute, as a substitute for that repuired by the law merchant, is the suing of the maker, not the indorser (Hart. Dig., Art., 2520, 2528). The statute does not require that the indorser shall be sued at the first term of the court. The fact of the makers insolvency renders the indorser liable at once; and if his liability is fixed, so that he may be sued in the first instance, without suing the makers, the omission to sue at the first term is an indulgence to him of which he cannot complain. He cannot object that he was not sued as he might have been, nor can he complain, that the maker was unnecessarily joined in the suit. He will be entitled to the benefits of the judgment against the maker, if anything can be made of it. We are of opinion that the court erred in sustaining the demurrer and dismissing the cases to the defendants in error" and reversed the case.

"The insolvency of the maker of the note was a sufficient excuse for not having first or simultaneously sued him."

Gayson v. Taylor, 14 Texas, 675.

In Texas Court of Appeals, 1 White & Wilson, page 697, Sec. 1215, where notorious insolvency was alleged and the Court of Appeals of Texas was asked to look into the rule that allegation of insolvency took the case out of the due diligence statute, and review the decisions of Supreme Court, and it said: "We prefer that law on this

subject shall remain settled as they have settled it. It is well-known, works no injury and there could not be the slightest reason for changing it."

Cambell v. Wilson, 6 Tex., 379.
Baily v. Heald, 14 Tex., 226, 675.
Dent v. Swift, 11 Tex., 278.
Insoll v. Robson, 16 Tex., 128, 456; 18 Tex., 128.
Fisher v. Phelps, 21 Tex., 551.
Hendricks v. Alexander, 31 Tex., 694.
Stratton v. Johnson, 36 Tex., 90.
Burroys v. Yapp, 69 Tex., 474.
First National Bank v. Bonner (Civ. App.), 27 S. W. 698.
Hunt v. Wiley, 1 White & Wilson Civ. Ct. App. 1215.
Oglesby v. North Dallas Imp. Co. (Civ. App.), 28 S. W., 1016.
Texas Civ. Ct. App., 1 White & Wilson, No. 764, page 420.

The following was a case where the party was insolvent at the date of assignment.

Platzer v. Norris & Co., 38 Tex. 1.

These statutes construed and settled by the highest court of Texas, hold an assignor, where insolvency exists, is a principal and not a surety, and no diligence is required to fix his liability, for the very best reason it is his debt, and a general demurrer would not lie on the ground that due diligence was not alleged.

This was the settled construction of this statute by the Supreme Court of the State of Texas, when in 1887, it was adopted into the Revised Statutes of Arizona, and Sec. 1208 of Revised Statutes of Texas, 1879, appears verbatim in the Revised Statutes of Arizona Territory as Art. 788, Sec. 40, Practice act. On this section and construction appellants hang their rights.

It thereby became the settled law of Arizona Territory, under the rule of *stare decisis.*

Identity of language of statutes determine the identity of their construction in the State or Territory of their adoption.

Black Interpretation of Law, 33.
Metropolitan R. R. Co. v. Moore, 121 U. S., 558.
Cauter v. Stafford, 48 Fed., 268.
Black on Interpretation of Laws, 159, and long line of decisions there cited.
Douglas v. Pike, 101 U. S., 677.
Taylor v. Yksilanti, 105 U. S., 72.
Carroll v. Carroll, 16 How., 275–286.

Wells and Fisher v. Eastern Trust & Banking Co. 67 U. S.

The adoption of a statute adopts the silent construction thereof.

"A different construction ought not to be adopted if thereby the policy of the act is subverted or its material provisions defeated."

McDonald v. Hovy, 110 U. S., 619.

Warner v. Texas and Pac. R. R. Co. 64 U. S. 418-423.

Stare decisis applies with equal force on adopted statutes as the rule in the same State would on a statute originating there.

Block on Interpretation of Laws, 413.
Cooley Constitutional Limitations, 52.

In Cathcart v. Robison, 5 Pet., 280, where Chief Justice Marshall, speaking of English decisions, when an English Statute was adopted here, said: "By adopting them they became our own as entirely as if they had been enacted by the legislature."

In German Bank v. Franklin County, 128 U. S., 526, it is said: "After a statute has been settled by judicial

construction, becomes so far as contract rights are concerned, as much a part of the statute as the text itself and a change of decision is to all intents and purposes the same in effect on contracts as an amendment of the law by means of a legislative enactment."

Douglass v. Pike, 101 U. S. 677.

The contracts made in this case were made under the statute as it stood November 28, 1894, as quoted above, and the construction placed thereon by an unbroken line of decisions for nearly 60 years by the highest court of Texas from whence the statute was adopted. The appellant's rights were complete. The Supreme Court of Arizona could no more silence the decisions of the Supreme Court of Texas, construing that statute, than it could strike down the statute itself.

The legislature could not repeal this statute so as to deprive the appellants of their rights and their remedy.

Where a statute was adopted from Massachusetts into California and in the latter State construed differently from the construction placed thereon by the Supreme Court of Massachusetts, the same statute was thereafter adopted from California into the Utah Territory Statute. Upon appeal in a case from Utah Territory, to this court, the question was which would this Court follow, the construction by California or Massachusetts, and this Court followed the rulings of Massachusetts on the original construction by the Supreme Court of Massachusetts.

Coleman v. Daull, 133 U. S., 216.
Norton v. Shelby, 118 U. S., 425.

A *fortiori* this Court will follow the rulings and construction of the statute of the Supreme Court of Texas in this case, in preference to the wrong rulings of the Supreme Court of Arizona Territory.

Therefore, under the rule of *stare decisis*, the court below was wrong in holding that the complaint in this case alleging notorious insolvency did not state a cause of action, because it did not state that due diligence had been used to callect the note from the makers thereof.

Can evidence aliundi be used to aid a demurrer? Can resort be had to an exhibit to the bill?

The court below not itself satisfied with the soundness of its decision sought to shield the error behind a resort to Exhibit A, in the bill in which it is said "secured by chattel mortgage of even date herewith." Whatever this phrase may be moulded into, the appellee by its general denial, denied it, and should it be said to mean property, then no property being shown the appellee must prevail. There was no property. There is none. If then exhibits to the pleading is to be resorted, why not look and see that when this phrase appears, whatever it may mean, appalee denied it.

On general demurrer every reasonable intendment arising upon the pleadings excepted to will be indulged in favor of its sufficiency.

47 Texas, 619.
Preuit v. Farris, 5 Texas, 371.
Banks v. Watson, 48 Texas, 107.
Johnson v. Dowling, 1 App. C. C., Sec. 1094.
Sulivan v. Iron-Silver Mining Company, 109 U. S., 550.
Pullman Palace Car Company, v. Missouri Pac. R. Co., 115 U. S., 587.
Victoria v. Clyde, 86 N. Y., 384.
Stone v. Day, 69 Texas, 13.

A demurrer admits the facts well plead, as well as what may be reasonably implied therefrom.

Milligan v. Westers Union Telegraph Company, 110 N. Y., 403.
Phœnix National Bank v. Acland (Sup. Ct.), 34 N. Y. St. Rep., 497.
Waldon v. Crig, 14 Pet., (U. S.), 152.
Tyler v. Hand, *et al.*, 7 How., 573.
Darrow v. Home Produce Company, 57 Fed. 463.
Lyons v. McCrackin, 10 Fed. 664.

Demurrer cannot be aided by extraneous matter.

Robbins v. National Stock Yards, 20 Blachf., 664.

An exhibit is no part of a pleading and cannot aid a demurrer, nor be objected to by demurrer. It is not an allegation of fact.

Fed. case 4834.
Fed. case, 10469.

Exhibits form no part of the complaint and cannot be considered in determining its sufficiency on demurrer.

Curry v. Lackey, 35 Mo., 392.
Pomeroy v. Fullerton, 113 Mo., 440.
Burkett v. Griffith, 90 Cal., 540.

Demurrer must prevail or fall on the face of the pleading to which it is directed.

Clark v. Halt, 16 Ark., 257.
Rust v. Frothingham, 1 Ill., 32.
American Ins., Co., v. Replagle, 114 Ind., 1.
Dearmond v. Balleau, 122 Ind., 398.
State v. Simpkins, 77 Iowa, 678.
Polk County v. Hurb, 37 Iowa, 363.
Cassett v. Vogal, 14 Mo. App., 317.
Brown v. Worden, 44 N. J. L., 177.
Coe v. Beckwith, 19 How. Pr. (N. Y. Sup., Ct.), 404.

Modgeburg v. Wihleiu, 53 Wis., 165.
John Putzler & Company v. Carlson, 76 Wis., 33.
Valdon v. Craig, 14 Pet. (U. S.), 152.

The pleader must make under the code "a full clean statement of his cause of action."

An exhibit may be evidence of a contract, but its term can not take the place of allegations of its legal effect.

Guadalupe County v. Johnson, 1 Texas Civ. App., 715.

Filing an exhibit takes the place of profect at common law and if they vary, no advantage can be taken of it by demurrer.

Penrose v. Pac. Ins. Co., 66 Fed., 253.

Some States require written contracts to be filed with the pleading, as an exhibit. In such States it would be ground for a demurrer should a written contract be pled and not filed. Where these laws exist an exhibit is a part of the pleading by operation of law, by virtue of the statute making it such.

Where such statutes do not exist, an exhibit can not be used to assist a demurrer.

A case comes to this court from the State of Illinois, where such a statute is in force, and this court held that in such case the exhibit was a part of the bill by statute, and could aid the demurrer.

Norvoo v. Retten, 97 U. S., 391.

The converse would be true where no statute existed.

Norvoo v. Retten, 97 U. S., 391.

Speaking demurrers, founded on matters collateral to the pleading are bad, and should be overruled.

Cook v. De La Guerro, 24 Cal., 239.
Kann v. State, 74 Cal., 191.
State v. Putnam County, 13 Fla., 632.
Williams v. Davis, 46 Ill. App., 228.
Balt. Pk. Co., v. Riche, 31 Md., 198.
Dehamy v. Woodson, 100 Mass., 198.
Coe v. Beckwith, 19 How. Pr. (N. Y. Supreme Court), 398.
Van Glan v. De Rosset, 76 N. C., 292.
Wyoming Co., v. Bordwell, 84 Pa. St., 104.
Hust v. Conn, 12 Ind., 257.

There being no statute requiring an exhibit to be filed with the pleading in Arizona, the exhibit to the pleading under the code stood merely as evidence, collateral to, but no part of the allegations of the bill, and could not under any theory be used to assist the demurrer of the Supreme Court of Arizona. If the theory of the lower court was permissible, no case could arise in which due diligence would not be necessary to be alleged.

The theory of appellants under this statute is that in cases where insolvent paper is assigned the question of due diligence cannot arise.

In a case of the assignment of solvent paper due diligence is the defense of the surety and like any other surety he would be obliged to set it up and prove it or judgment would go against him. The law could give him a defense of due diligence before he could be held, but he must avail himself of it or let judgment go against him.

Due diligence elsewhere.

Adverting to the question of allegation of insolvency and the assignment of an insolvent note and knowledge of that fact at the time of assignment, as being sufficient to take the case out of the operation of another statute requiring *due diligence* to be used to fix the liability of the

assignor, we show that other courts have not been silent on the subject. In Davis v. Helm, 34 Mo. App., 332, Seymore D. Thompson, J. speaking of the Missouri statute, Sec. 665, where insolvency or non-residence is sufficient by statute to relieve an assignee from the necessity of suing the maker of a non-negotiable note as a condition to the fixing of the liability of the assignor, said: "The undisputed facts of non-residence excused the assignee from using due diligence in collecting the note from the maker by *terms of the statute* and took the case out of the operation of a line of decisions based on the statute requiring diligence."

Clemons v. Collins, 14 Mo., 604.
Ivory v. Carlin, 30 Mo., 142.
Boker v. Blodes, 23 Mo., 405.
Wells v. Boggs, 31 Mo., 124.

In Dick v. Hitt, 82 Ind., 92, Elliot, J., speaking of a case where the district court had held that the proof of no property subject to levy, was not sufficient to relieve due diligence, said: "If the conclusion reached below is correct, then in no case can a judgment be obtained against an assignor until one has been obtained against the maker, and the exemption claimed in the manner prescribed by law. This would entail needless expense, cause useless litigation and produce no good result. A rule likly to be productive of such consequences can not be a sound one."

In Camden v. Dormus, 15 Curtis, (U. S.), 540, Camden Pltf. in error, v. Dormus, 44 U. S., 515, it is said by this court "The diligent and honest prosecution of a suit to judgment with a return of *nula bona* has always been regarded as one of the extremest tests of due diligence" "This phrase and the obligation it imports may be satisfied however by other means. The ascertainment upon correct and sufficient proof of entire or notorious insolvency is

recognized by the law as answering the demand of due diligence and dispensing with the more dilatory evidence of a suit; evidence which in instances that it may be easy to imagine, might prove prejudicial alike to him who should exact and to him who would supply it."

Insolvency sufficient to excuse suit against maker.

It would be "idle to bring a suit against them."

Wills *et al.* v. Claflin, 92 U. S., 135.
Bank v. Weisiger, 27 U. S., 331 (2 Pet).
Fed. Case, 8330.
Fed. Case, 10839.
Fed. Case, 7212.
Dent v. Ashley, Fed. case 3809, b.
Lemmon v. Chateau, Fed. Case, 8239, a.
Simmons v. Wilson, Fed. Case 12658.

The measure of damages on recovery of an assignor on a non-negotiable note is the consideration paid and interest from the date of the assignment.

Missler v. Bogg, 31 Mo., 124.

Many other State cases could be cited in favor of the theory of appellants. This case stands on the most liberal doctrine of the liability of an assignor by the terms of the Arizona statute, Art. 788, 40. What can the assignor lose to be compelled to take back an insolvent note and give credit for it on solvent notes, secured by mortgage on real estate? It sold nothing, and gets back what it sold. It gets the benefits of whatever judgment that may be obtained against the makers. On the other hand, it will be able to go scot free with $10,000 worth appellants property, for which appellant will get nothing, as the statute of limitation would possibly cut appellant off from another suit against the assignors, should appellant be

shut out on this suit against the appellee; the makers being in a hopeless state of notoriously insolvency.

Insolvency.

Insolvency existed when the note was assigned, as shown by the contract of assignment (Rec. p. 69). This was well-known to all parties (Rec. p. 63.) The note was sold on the solvency of the bank as their note (Rec. p. 64.) It was then understood by all parties that the bank's guarantee went with the note (Rec. pp. 64, 124, 127), when Mr. Chalmers, attorney for the appellee testified: "Daggs' had previously drawn a contract up where they claimed a guaranty and I had drawn up this, covering all other notes." The appellee had assigned the over draft and the collateral notes without recourse on it (Rec. p. 104), but no such an exemption appears on the contract of the assignment of the $5,000 note (Rec. p. 69.) It was not intended that the bank should be liable for this note, but the bank changed owners and presidents. James A. Flemming was president when the assignment was made (Rec. pp. 51, 69), where his signature appears on the assignment.

Afterward, at the suit November 12, 1896, Mr. F. S. Belcher testified that he was president, and came in February, 1895 (Rec. p. 51). The notes were due, November 1, 1895. This suit was brought, February 21, 1896, about twelve months after Mr. F. S. Belcher came in. Rec. p. 6, shows the file-mark of this action.

Insolvency exists where a debtor cannot pay his debts as they become due in the usual course of his business.

Thompson v. Thompson, 4 Cush. (Mass.), 127.
Buchanan v. Smith, 16 Wall, 227.

Demurrer Sustained by Supreme Court.

The demurrer of the appellee was overruled by the district court, but the Supreme Court without mentioning that fact, of its own account, took up the same demurrer and held the counterclaim did not state a cause. It thus reversed the district court, but instead of remanding the cause, it affirmed the decision. This deprived the appellants of their legal right to amend their bill and save the cause of action.

When a demurrer is reversed in an Appellate Court the case then stands again in the lower court, subject to such practice and pleading as appears proper there.

United States v. Boyd, 15 Pet. 187.
Teal v. Walker, 111 U. S., 242, 472.

The practice act of Arizona was taken almost literally from the Texas Code, and is the most liberal in amendments to pleading.

Rev. Stat. Arizona, 1887, 667, Sec. 19. "All pleadings or proceedings may, upon leave of the court, be amended at any stage of the action upon such time as the court may prescribe, or they may be amended before trial without such leave, upon serving the adverse party with a copy of such amended pleadings or proceedings."

If the view of the lower court obtain, then the appellant has the right to amend his bill.

The court below say *due diligence* should be alleged.

The bald allegation of *due diligence* is not a composite statement of facts, but a mere allegation of a conclusion of law and would not help any pleading.

Leas v. White, 15 Iowa, 191.
Harrington v. Wilson, 2 Cranch., 37.

We have shown the bill sufficient under the settled law of Arizona Territory, as adopted from Texas under the rulings for nearly 60 years by the highest courts of Texas. We show the bill sufficient under the rulings of other States and the United States.

We have shown that the court below mistook the theory of the bill and injected a theory of its own, and held appellants bill bad on its theory.

We have shown that an exhibit cannot be used to assist a demurrer.

We have shown that the bill was held sufficient at the trial in the district court, and that ruling reversed by the Supreme Court and judgment affirmed, cutting off the right to amend.

We have shown by the proof in the pleadings and evidence the notorious insolvency of the makers of this $5,000 note.

We have shown that appellants prosecuted the makers of this note by suit in name of the appellee and spent over $500 in money and $500 in service, and would have went further but was prevented by appellee, and submit on this demurrer appellants should have judgment.

Error No. VII, stands as an error on the face of the Record proper.

The two so-called supplemental complaints (Rec. pp. 11, 19), do not state facts sufficient to constitute a cause of action. In both, the allegations are to the same effect, and say that appellee purchased tax sale certificate Nos. 100, 97, 98 and 128 of certain date, describing certain lands for territorial and county taxes, then use this allegation: "That said taxes were a lien upon the land, set out in the

complaint in this mortgage." In the other so-called supplemental complaint, the pleader used this language after describing land, and say: "The said tax certificate was a lien upon the land," without more or further allegations. Referring to the tax sale certificates, it is seen that they are not tax receipts for the payment of taxes, which is called for by the mortgage which says: "all payments" "on account of any taxes." They did not pay the taxes, but let the property sell and then voluntarily redeemed tax sale certificates from other persons.

Two points are made.

1. The allegation—that the tax sale certificate was a lien, is not an allegation of fact, but the bald averment of a conclusion of law, this is not sufficient. The code system is a pure fact system. He should state the facts entitling the paper to become a lien and the court will say whether *he has* a lien.

Frazier v. Thomas, 6 Ala., 169.
Keener v. Eagle Lake Land and Elec. Co., 110 Cal., 627.
Cairo R. R. Co. v. Canble, 85 Ill., 555.
Moore v. Cape Fear R. R. Co., 112 N. C., 236.
Merigan v. English, 9 Mont., 123.

2. It is not alleged that the originals of the so-called tax sale certificates were even signed by or filed with the proper officer so as to become a lien on the property.

The statute of Arizona controlling such matters is as follows: "The certificate must be signed by the collector and one copy delivered to the purchaser, and the other filed in the office of the recorder."

Sec. 12, Session Laws, 1893, p. 130.

The pleader should allege that the original tax sale certificate, a copy of which he was the owner, was signed

by the collector naming him and filed with the recorder, naming him of the county and Territory in which the property is situated.

These two steps must be taken before a tax sale certificates can ever become a lien on the property mentioned in it.

Section 14 of the same act is as follows:

"On filing the certificate with the county recorder the lien of the Territory vests in the purchaser."

It is not alleged or proved that the two prerequisites, essential to pass the lien from the Territory to the purchaser, has ever been complied with. They are neither alleged or proved, we therefore submit that the bald allegation that the purchaser of tax sale certificates has a lien is not a sufficient allegation in such cases to state a cause of action, the two statutory steps must be complied with, before a cause of action ever exists.

We will now proceed to show that the causes of action were confessed, and stand now confessed, on the face of the pleadings by the failure of the appellee to make proper reply to the counter claims, as required by the Statute of Arizona Territory.

Error IV, VIII, IX, Successively.

The counterclaim on the $5,000 note was duly verified. Appellee must reply thereto under oath, or it confesses the bill.

The court below compelled the appellee to file a reply (Record page 119). Appellee then filed a general demurrer and a general denial, not under oath to (Record, page 46), singling out the counterclaim of the $5,000.00 note,

because both demurrer and general denial are in the singular, and that was the theory in the district court. The action on the $5,000.00 note was the only one named a counterclaim on the face of the bill; the other two being called answers.

The Statutes of Arizona were rescripted from Texas and will now be here printed. Where the rule prevails that a failure to reply under oath, confesses the allegations of the bill, where the bill is founded in whole or in part on a written instrument.

Texas Rev. Stat., 1879:

"PLEADINGS OF THE PLAINTIFF."

Article 1196. "When the defendant sets up a counterclaim against the plaintiff, the plaintiff may plead thereto under the rules prescribed for the pleadings of defensive matter by the defendant, so far as the same may be applicable; and whenever under such rules the defendant is required to plead any matter of defense under oath, the plaintiff shall in like manner be required to plead such matters under oath, when relied on by him."

Rev. Stat. of Arizona Territory, 1887:

Par. 671, Sec. 23. "When the defendant sets up a counterclaim against the plaintiff, the plaintiff may plead thereto under the ruies prescribed for the pleading of defensive matter by the defendant, so far as the same may be applicable; and whenever under the rules the defendant is required to plead any matter of defense under oath, the plaintiff shall in like manner be required to plead such matter under oath, when relied on by him."

These Statutes are the same; under them, a plaintiff where a counterclaim is plead by the defendant is put in

the same attitude the defendant is in when he is sued by the plaintiff, and must reply under the rules of pleading, like the defendant answers the plaintiffs complaint. The only exception being in the following section, which does not apply to a counterclaim, nor to any of the defenses here set up.

672, Sec. 24, Rev. Stat. of Arizona, 1887. "It shall not be necessary for the plaintiff to deny any special matter of defense pleaded by the defendant, but the same shall be regarded as denied unless expressly admitted."

A counterclaim is not a special defense, it is an action in and of itself, and should the plaintiff dismiss his complaint the defendant would nevertheless recover on his counterclaim.

Rev. Stat. of Texas, 1879, Chapter eight:

PLEADINGS OF THE DEFENANT.

Article 1265. "An answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit (omitting Sub. 1, 2, 3, 4, 5, 6 and 7, as not applying in this case, the section goes on.)

8. A denial of the execution by himself or by his authority of any instrument in writing, upon which any pleading is founded, in whole or in part, and charged to have been executed by him or by his authority, and not alleged to have been lost or destroyed." (Omitting balance subdivision as not applying.)

"9. A plea denying the genuineness of the indorsement of the assignment of a written instrument as required by article 271."

Art. 271. "When a suit shall be instituted by any assignee or indorsee of any written instrument, the assignment or indorsement thereof shall be fully proved, unless the de-

fendant shall deny in his plea that the same is genuine, and moreover shall file with the papers in the cause, an affidavit stating that he has good cause to believe and verily does believe, that such assignment or indorsement is forged.

Art. 1265, Texas Stat., *supra*, proceeds:

"10. That a written instrument upon which a pleading is founded, is without consideration, or that the consideration of the same has failed in whole or in part."

"11. That an account which is the foundation of the plaintiff's action and supported by an affidavit, is not just, and in such case the answer shall set forth the items and particulars which are unjust."

Rev. Stat. of Arizona Territory, 1887, Chapter 8:

PLEADINGS OF THE DEFENDANT.

735, Sec. 87. "Any answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit (omitting subdivisions 1, 2, 3, 4, 5, 6, 7, as not applying)."

"8. A denial of the execution by himself or by his authority of any instrument in writing upon which any pleading is founded, in whole or in part, and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed."

"9. A plea denying the genuineness of the indorsement or assignment of any written instrument."

That while this subdivision don't refer to any section of the Arizona statute, the one corresponding to the one referred to in this subdivision in the Texas is as follows:

127, Sec. 9. "Where a suit shall be instituted by any assignee or indorsee of any written instrument, the assignment or indorsement thereof shall be regarded as fully proved, unless the defendant shall deny in his plea that

the same is genuine, and, moreover, shall file with the papers in the cause an affidavit, stating that he has good cause to believe, and verily does believe, that such assignment or indorsement is forged."

735, *supra*, subdivision 10. "That a written iustrument upon which a pleading is founded is without consideration, or that the consideration of the same has failed in whole or in part."

"11. That an account which is the foundation of the plaintiff's action, and supported by an affidavit, is not just, and in such case the answer shall set forth the items and particulars which are unjust."

These statutes show that when the appellee failed to reply under oath to this written instrument, or any written instrument where the cause of action is founded in whole or in part on a written instrument that it confessed the note; that it confessed the assignment.

That it must plead as the defendant would have to plead in such case to the complaint of the plaintiff, and not having done so it confessed the cause of action of appellant.

Where a note and account are set out in the same pleading, both are admitted by failure to deny under oath.

Dial v. Taylor, 8 Texas, 269.
Furguson v. Wood, 23 Texas, 178.
Austin v. Townes, 10 Texas, 30.
Fulshier v. Random, 18 Texas, 277.
Prince v. Thompson, 21 Texas, 481.

Unless the petition is denied under oath there is no issue on the execution of the note.

Pearce v. Bell, 21 Texas, 691.
Diew v. Harrison, 12 Texas, 281.

Proof of agency can only be required by plea under oath.

Reid v. Reid, 11 Texas, 592.

Where a cause of action is founded in whole or in part on a written instrument it must be denied under oath, or it will be taken as confessed.

Prince v. Thompson, 21 Texas, 481.
Fulshier v. Random, *supra.*
Parsons v. Frost, 25 Texas, Sup. 129.

This section dispenses with the proving of the execution of the instrument sued on where there is no denial under oath.

Armstrong v. Lipscomb, 11 Texas, 651.
Kinnard v. Herlick, 20 Texas, 48.
Robison v. Bronson, 20 Texas, 440.
Lewin v. Houston, 8 Texas, 96.
Able v. Chandler, 12 Texas, 88.
Motossy v. Frost, 9 Texas, 618.

This rule is held to apply in this court, as well as other jurisdictions, that bill is admitted by failure to deny it.

Deputon v. Young, 134 U. S., 241.
Frederica Dover v. Tyrell, 59 Cal., 97.
Cunningham v. Norton, 40 Pac., Rep. 491.

See also U.S. Cases page 69 this brief.

By overruling the appellees demurrer in the court below the district court adjudged the counterclaim sufficient, and there being no reply it stood confessed.

Wilson v. Hawthorne, 14 Colo., 532.
Pomeroy's Rem., Sec. 617.
Crater v. McCormick, 4 Colo., 196.
Tucker v. Parks, 7 Colo. 62.

Teller v. Hartman, 16 Colo., 448.
Frugus v. Tinkham, 38 Ill., 409.

Failure to deny is equivalent to confession.

McMillan v. Gambell, 115 N. Car., 352.

It is now shown that this cause of action was confessed and stood confessed on the face of the pleadings, and further than this, while the appellee was permitted to introduce evidence at the trial, if it could, to defeat the action on the $5,000 note, it did not introduce one single jot, tittle or squint of evidence to refute the collection of this $5,000 note, not one; and that the most searching review of this record will show that there is but one suspicion therein contained against the recovery on this note, and that is the eight words on the face of the note: "secured by chattel mortgage of even date herewith" and they were denied by the general denial of the appellee; and no evidence offered by appellee that there was property, but, on the contrary, the truth was shown by appellant, that there had been property under the mortgage referred to by this phrase (Record, page 64), and that it was in suit, and had been lost by an adverse decision (Record, page 62) to appellee in Supreme Court of Arizona. And that appellee fell down and refused to go further with that suit, and then the property mentioned by this phrase was lost by the fault of appellee. And the first mortgage, sold by appellee to appellant, turned out not to be a first mortgage. It sold that which it did not have.

That while the light of this evidence was before the court below it blinded its eye to it all and seined up this phrase, sawed the case off at that very point, and said: "This omission in the pleadings is doubly fatal, for the reason that the note appears, from an indorsement upon

its face, *to have been* secured by chattel mortgage of even date therewith."

This leaves the case standing admitted; proved; property under the chattel mortgage accounted for; makers insolvent suit prosecuted against them in the appellee's name by appellant to Supreme Court of Arizona; the bill stating a cause of action complete on its theory, and judgment should follow in favor of appellants. What was done by the court below? A different theory from the one set forth in the pleadings, was assumed. A demurrer that had been overruled in the district court, was taken up and without saying anything about the district court's action on the demurrer, that demurrer was sustained. The district court was reversed and the judgment affirmed, and then sawed the case off and sought to strengthen it by the above phrase. When it is understood there is nothing in the record for the appellee but this phrase, it is significant that the case was sawed off at that very point and a position taken that the assignment of error would not permit a further review of the case. All there was in the record for the appellee was in the phrase, "secured by chattel mortgage of even date herewith" and appellee denied this and this is used, plus an assumed theory of law to crush the whole three counterclaims of the appellants.

Appellants therefore submit that they should have judgment on the $5,000 note according to its tenor and effect, and should the assumed theory of the court below on the pleadings be thought by the Honorable Court to be correct, then the case ought to be reversed and allow such amendments to be made as will meet the demands of justice.

Assignment of Error No. VIII

is founded on the refusal of the court below to decree

judgment in favor of appellant on thier suit against appellee for the breach of a written contract.

The cause of action here referred to is founded on a written instrument (Record Page 113), for the breach of its terms (Record Page 25-43-111). There is no reply to this verified counterclaim by the appellee. It stands admitted, the argument produced under assignment ~~III~~, IV ~~and VII~~ *supra*, is of equal force in this assignment, and is here referred to as argument sustaining this counterclaim. It will be seen that the reply of appellee did not purport to reply to this cause of action, but singled out the cause of action mentioned as a counterclaim and answered that by general demurrer and general denial unverified (Record page 46), and as the reply is in the singular and addressed to the counterclaim, and as the only answer mentioned as a counterclaim is on the $5,000 note, the other two answers denominated simply answers. It is seen the appellee made no reply whatever to this answer. It stands as suit on a written instrument charged to have been executed by appellee "in whole," (subdivision 8, Sec. 87, Art., 735, Rev. Stat., Ariz., 1887, *supra*), its *execution* stands admitted under the terms of the statute. The *consideration* is (under subdivision 10 of the same act *supra*) also by the terms of the statute admitted. These two admitted then was the breach of the terms of the contract admitted as alleged, our contention is that it was, it was new matter and a counterclaim and under section 671 of the Arizona Statue, *supra*, the (appellee) plaintiff must answer as the defendant would have to answer the complaint of the plaintiff. If the defendant did not answer the complaint of the plaintiff at all, it would be a default, and all the plaintiff would be required to do would be to take default and take his judgment. Now, where a counterclaim is plead by the answer of the defendant, the plaintiff can reply to it in the same manner as the defendant answers the

plaintiff and if he fails as here, judgment goes against him the same as judgment would go against the defendant. This is the plain face of the statute.

If the defendant would have to answer under oath, so would the plaintiff have to reply to the counterclaim under oath. If the defendant would have to answer new matter, so would the plaintiff have to reply to the counterclaim of new matter. If by not answering, the defendant would suffer default, so would the plaintiff by refusing to reply to the counterclaim of new matter, or suffer a default, and thus upon the plain face of the statute, this suit stood on the pleadings admitted by failure of appellee to reply to this counterclaim of appellant.

The sole difference between the reply to the $5,000 note and the action for the breach of written contract is that replying to the $5,000 note would require the entire reply to be under oath, while in this action, part only need be replied to under oath, but the balance being new matter, it must reply somehow or such new matter will be taken as true and confessed.

The breach of contract is proper subject-matter for an action by counterclaim. Its new matter here growing out of the same transaction.

Rev. Stat. Ariz. Ter. ~~Article~~ 734, Sec. 86. The defendant in his answer may plead as many several matters, whether of law or fact, as may be necessary for his defense, and which may be pertinent to the cause, but such pleas shall be stated in the following order and filed at the same time:

"5. Matters of counterclaim and set-off."

Rev. Stat. Ariz. Ter. ~~A. T. Statute~~ 736, Sec. 88:

"Whenever any suit shall be brought for the recovery of any debt due by judgment, bond, bill, or otherwise, the defendant shall be permitted to plead therein any counter-

claim which he may have against the plaintiff, subject to such limitation as may be prescriced by law."

—738, Sec. 90. "On the trial of such issue, if the defendant shall establish a demand against the plaintiff exceeding that established against him by the plaintiff, the court shall render judgment for the defendant for such excess."

Bliss on Code Pleading, 374.
Preston v. Roberts, 12 Bush, Ky., 571.
Richards v. Hayward, 71 Mo., 560.

A failure to reply to the counterclaim is a solemn admission on the record and the court will not look to see whether such bill or answer is sustained by proof.

Moore v. Sanboro, 42 Mo., 495.
Hart v. Ins. Co., 21 Mo., 91.

On failure to file replication judgment goes for counterclaim.

Aston v. Wallace, 43 Ind., 468.
Aymer v. Chance, 12 Barb. (N. Y.), 301.
St. Louis v. Clemons, 36 Mo., 467.
Hubner v. Sheppard, 63 N. W. Rep., 892.

Where there is no replication new matter is taken as true.

Banks v. Manchester, 128 U. S., 244.
United States v. Dallas Military Road Co., 140 U. S., 599.
Harper v. Ross, 140 U. S., 71.
Roberts v. Perkins, 129 U. S., 233.
Fisoth v. Doolittle, 120 U. S., 73.
Depritson v. Young, 134 U. S., 241.
Stewart v. Barnes, 153 U. S., 456.

It is error to decide a case against the answer of the defendant not denied by a replication.

Gettings v. Burch, 9 Cranch., 372.
American File Co. v. Garret, 110 U. S., 288.
United States v. Buford, 3 Pet., 12.

Counterclaim admitted by failure to reply.

Toland v. Sprague, 12 Pet., 300.
Breedlove v. Nicolet, 7 Pet,, 413.
Randolph v. Bonnet, 16 Pet., 138.

Where declaration has two counts, plea to first one and that stricken out on trial, judgment should be given on the second one for want of a plea.

Hogan v. Ross, 13 How., 173.

"Where the ultimate fact is admitted on the record probative facts tending to establish, modify or over come it, are not the proper subjects of judicial action."

Mulford v. Estidillo, 32 Cal., 139.
Camp v. Lossen, 67 Cal., 139.
Walker v. Bren, 67 Cal., 599.

All the authorities here cited are applicable to the suit by counterclaim on the $5,000 note and *visa versa.*

It is a confession on the record by operation of the statute and also by the well-known rule of pleading that new matter must be answered or replied to or taken as confessed.

The statute puts plaintiffs in the same attitude in replying to a counterclaim as the defendant would have to answer to the complaint of the plaintiff's. Appellants insist they should have judgment upon the statute and authorities cited.

Assignment of Error No. IX,

relates to the $4,000 worth of water stock pledged as

collateral security to appellee, to secure the three notes sued on.

This is a suit for $4,000 worth of water stock, pledged as collateral security to appellee by appellant, for which it refused to account and converted the same. Record, pages 26-44-112, where the bill or complaint may be found. Conversion is the proper subject of a counterclaim.

Rev. Stat. of Arizona Territory, 1887, Art. 734-736 and 738, *supra:*

Johnson's Bliss on Code Pleadings, p. 374.
Maxwell on Code Pleading, 544.
Ainsworth v. Bowen, 9 Wis., 348.
Grand Lodge v. Knox, 20 Mo., 433.
Watson on Set-off, 616.
Daugherty v. Stamps, 43 Mo. 243.
Kisler v. Tinde, 29 Ind., 270.
McArthur v. Canal Co., 34 Wis., 139.
Walker v. Wilson, 13 Wis., 522.
Hall v. Gale, 14 Wis., 34.

The matter set up in the counterclaim is new matter and comes under the same rule as to new matter as Assignment No. VIII and IV, just argued and authorities there cited.

There was no pretense in the court below to answer this counterclaim, and no effort to disprove it.

The same rule of law obtains as to this counterclaim as obtains in the case of the $5,000 note under Assignment No. IV, and the breach of the written contract, Assignment No. VIII.

On the $5,000 note it is confessed if not answered under oath.

On the breach of written contract, if it is sought to deny its execution or its consideration, it must be under

oath, but all other new matter comes under the statute requiring a reply to new matter in counterclaim, as the defendant would be compelled to answer the plaintiff. And the conversion being new matter must be replied to some way, and if it is not it's allegations stand as true and judgment, as by default of the defendant, goes against the plaintiff under the statute and the usual rules of pleading.

The theory upon which the appellee proceeded, and upon which the District and Supreme Court of Arizona tried the case, was, that on the breach of the written ~~for~~ contract, and for the counterclaim of the conversion of the $4,000 worth of water stock, did not require a reply. In fact the counsel for the appellee contended there was no necessity to file a reply to any of the counterclaims, (Record, page 119) but the court gave "the parties thirty minutes to reply to the counterclaim."

Appellant contends that unless a reply was made to the counterclaims the same as a defendant would be compelled to answer the complaint of the plaintiff, under the statutes cited and quoted, *supra*, the same result would follow in either case, a default; matter confessed; and taken as true.

We submit we should have judgment on all three of the counterclaims according to the pleading.

That while the appellants went further and proved their three counterclaims, they, by that, did not strengthen the facts confessed. When a fact is confessed as true by the pleadings it becomes a solemn admission on the record, and if its proved a thousand times it cannot be made stronger.

Assignment of Error No. XI, Relates to Appellant's Motion for Judgment.

It follows from what has been shown *supra*, that ap-

pellants motion for judgement was proper motion, and should have been sustained. The plaintiff, under Arizona Statute *supra*, bears the same relation to the defendant on a counterclaim that defendant bears to plaintiff on his complaint, and there was no reply. No pretense was made no reply to anything but the $5,000 note. A general denial unverified is no reply to a promissory note. The other answers stood without a reply.

Miles v. McCallan, 1 Ariz., 491.
Hancock v. Herrick (Ariz., 1891), 29 Pac. Rep., 13.
Felch v. Beaudry, 40 Cal., 439.
Hicks v. Lovell, 64 Cal., 14.
San Francisco v. Staude, 92 Cal., 560.
Alvoid v. U. S., 1 Idaho, 585.
Bernard v. Haworth, 9 Ind., 103.
Hutchinson v. Meyers, 52 Kan., 290.
Fields v. Montmillon, 5 Bush. (Ky.), 457.
Loyd v. Secord, 61 Minn., 448.
McDonald v. Pincus, 13 Mont., 83.
Irish v. Pheby, 28 Neb., 231.
Malony v. Lamphear, 8 How. Pr. (N. Y. Sup. Ct.), 491.
Tooth v. Clifton, 22 Ohio State, 247.

The same rule obtains where the plaintiff fails to reply to defendant's counterclaim.

McKensie v. Farrell, 4 Bosw. (N. Y.), 142.
Brown v. Spear, 5 How. Pr. (N. Y. Sup. Ct.), 146.
Comstock v. Hollock, 1 Code Rep. N. S. (N. Y. Sup. Ct.), 200.
Stoop v. Greensboro, Pl. Co., 10 Ind. 47.
Perkins v. Bragg, 29 Ind., 507.
Schurmin v. English, 46 Minn., 306.
Hebner v. Shepherd, 5 N. Dak., 56,
Iva v. Cea. Assoc., 40 Pac. Rep., 527.
Watkins v. Southern Pac. R. R. Co., 38 Fed. Rep., 711.

Where a counterclaim is set up by defendant, and plaintiff fails to reply thereto, defendant is entitled to default.

St. Louis v. Clemmons, 36 Mo., 467.

It cannot be contended that appellant A. J. Daggs waived his motion for judgment on the pleadings. At time his motion was made there was no reply of any kind or character.

He made his motion, stood upon it and thereafter throughout objected that there was no issue to be tried, and refused to offer any evidence whatever on his part. This was no waiver. This court will order such judgment as the lower court should have given. This was a motion for judgment under the statute where no reply was made, as was said in the case of Post v. Parfit, 4 Wash., 369. Where no reply is made to new matter constituting a defense, a counterclaim motion is proper, even after a defective reply; and even if the appellant here had gone to trial on the general issue made by the unverified general denial made to appellants counterclaims still being insufficient he could insist on the right to judgment on his motion.

Nelson v. Wallace, 48 Mo. App., 193.
State v. Finn, 19 Mo. App., 560.

Appellant A. J. Daggs made the motion for judgment and stood upon throughout and contended and objected to all evidence on the ground of there being no issue, and refused to put in evidence, and hence did not waive his rights under it.

Accident Ins. Co. v. Cranball, 120 U. S., 527.

Surety Discharged.

Assignment of Error No X

Under the assignment of error No. X, the surety con-

tends he is discharged from his liability as a surety on the grounds:

1. Appellee had breached its written contract with his principal to carry on the suit over the $5,000 note, and thereby closed the opportunity to recover the property under the mortgage.

2. That appellant had breached its contract in failing to pay the transcript fee that accrued prior to November 1, 1894.

3. That appellee had breached its contract and increased his burden by refusing to give credit on the three notes for the $5,000 note and interest.

4. That the appellee had converted the $4,000 worth of water stock and rendered his right to subrogation hopeless. One who gives a mortgage on his seperate property as this appellant did to secure the note of another, without signing the note, is a mere surety and has all the rights of any surety. Surety is discharged when the consideration fails. The consideration for the three notes partially failed.

Brandt on Suretyship and Guaranty, Secs. 127, 415, 413.
Cooper v. Goll, 1 De Gex Fish and Jo., p. 240.

Where one gives mortgage to secure the debt of another his property is surety for that debt and whatever will discharge an individual surety will discharge the property.

Brandt on Suretyship and Guaranty, Sec. 34 and cases cited.
Allen v. Adomola, 28 Fed. 346.

A surety is a favorite of the law and the slightest fraud on the part of the creditor touching the contract, annuls it.

Magee v. Manhattan Life Ins. Co., 92 U. S., 93.
Smith v. United States, 2 Wall., 219.
United States v. Conklin, 1 Wall., 644.

Any variation in sureties contract, even for his benefit, works his discharge.

Brandt on Suretyship and Guaranty, 388 and cases cited.
Atlantic National Bank, 51 Ga., 205.

A surety can plead any defense his principal can.

Very v. Watkins, 23 How., 469.

Surety has a right to know what the contract is to which he is a party.

Eyer v. Hallier, Loyd & Gould, (Temp. Plampt) 250.

Assignment of Error No. XIII,

applies to the consideration of written contracts. It shows that part of the consideration was based on the chose in action over the $5,000 note and that suit failed by fault of appellee, which appellee acknowledged. It refused to go further with the suit, after it had been decided adversely to it in the Supreme Court (Rec. p. 131), where the appellee admitted, it refused to carry on the suit. This lost the last vestage of a chance to recover the mortgaged property, by fault of the appellee. We contend there is somthing in this contention more specially to discharge the surety relying on this contract.

The failure of consideration was set up by the surety, R. E. Daggs, in his third verified answer. It was new mat-

ter and must be replied to or it will be admitted. There was no reply to this answer of failure of consideration, hence the surety should have judgment.

Stebbens v. Leufesty, 14 Ind., 4.
Smith v. Griswold, 95 Iowa, 684.
Babcock v. Drovers' Bank, 26 Pac., 1037.

Assignment of Error No. XIV.

This assignment relates to the description of the mortgaged property given by the surety. It is contended no foreclosure can be had on this property, because the property has no status. It is a bald description. No location, no place. Description not sufficient. No county or state. The rule is: Could the sheriff locate the property? It could be guessed one place as well as another.

Nolte v. Libbert, 34 Ind., 163.

In White v. Hyatt, 40 Ind., 385, the description was as follows: "A part of the N. E. ¼ of sec. 19, township 7, range 12 east, containing 97 17-25 acres; also a part of the southwest quarter of section 18, township 7, range 12 east, containing about 33 acres, being the same lands this day deeded by the said Wyatt as executor of Thomas Davis to said White, and being more fully described in said deed."

Court said description in mortgage too indefinite.

Crosby v. Dowd, 61 Cal., 602.
Whittlesey v. Beall, 5 Blackf. (Ind.), 143.
Buck v. Axt, 85 Ind., 512.
Keys v. Lardner, 55 Kan., 331.
Clements v. Draper, 108 Ala., 211.
Bayless v. Glenn, 72 Ind., 5.
Taylor v. Hern, 131 Ind., 537.

Description insufficient.

Kemp v. Moir, 45 Ill. App., 490.
Kerr Supplement to Wiltsie on Mortgages, vol. 2, page 1200, sec. 296.
Bowen v. Wickersham, 124 Ind., 404.

The omission in the pleadings to describe the property referred to and then referring to the mortgage where such description had been scratched out is a fatal failure to describe such property and the judgment of foreclosure on such property is error.

Crosby v. Dowd, 61 Cal., 557–603.
Emerick v. Tams, 6 Cal., 155.
Hosford v. Johnson, 74 Ind., 479.

It will be observed from this record that the pleading of the appellee omits the county and state or territory where the property is located. The county and territory, as shown in the exhibit, in the original mortgage was erased with a pen by scratching continuous lines through it, which will be shown hereafter.

Assignment of Error No. XV,

relates to the right of the surety to prove his answer (Rec. pp. 8, 9, 21, 22). This refusal, appellants contend is error, the surety should have been allowed to prove the agreement on which he gave his mortgage. If that was a part of the consideration of the surety's contract, that $5,000 note should be credited if lost, and if the appellee made this agreement, the surety is not liable on his contract of suretyship. if that consideration failed.

Assignment of Error No. XVI.

This assignment relates to the mutilation and alteration of the surety mortgage. The surety did not sign the notes in suit, but gave a mortgage on his property to secure them. After the mortgage was delivered it was, by some one, presumably the appellee, scratched, as is shown in the assignment (Record, page 150). We now, for the first time, notice that a large portion of the mutilation has been omitted from the copy of the Ex. F. (Record, page 115.) It also shows that it was not filed until February 9, 1898—sixteen months after the trial took place, October 12, 1896. Neither does the Ex. F, on page 115 appear to ever had a mutilation. Should the opposition deny the certified copy of this exhibit, as it appears on page 150 of the record, or the court think the record in its present form, does not sufficiently show the point for decision, we ask the court to order the original mortgage, which is now on file in the clerk's office of the Supreme Court of Arizona, to be sent to this court, that justice may be done the appellants. We assume the same influence that mutilated and erased a part of this mortgage, is at work to keep the record from showing such mutilation.

This court will order a record sent up to this court after submission of the cause where it deems it essential to the proper disposition of the case.

Morgan v. Curtenius, 19 How., 8.

The appellant offered this mortgage in evidence at the trial. It was then and there objected to (Record, page 51,) and the objection overruled, to which exception was then and there taken and saved. The record does not show that the appellee ever proved the signature to this paper, and hence it stands on the record without any proof of who executed the paper. It never could form a

prima facie case. The judgment of foreclosure was based on that instrument. We think it improper evidence to base a judgment on. One who signs a mortgage, but not the mortgage note, his property is but surety to the note.

Brandt on Surety and Guaranty, Secs. 21 and 22 and cases.
Spear v. Ward, 20 Cal., 659.
Ross v. Allen, 141 U. S., 534.

Any act of creditor changing his liability discharges the surety.

Miligan v. Calahan, 69 Tex., 205.
Norton on Bills and Notes, 287.
Sheets v. Hinger, 10 N. Y., 539.
Goodyear v. Watson, 14 Barber, 480.
Brandt on Suretyship and Guaranty, 79.
Miller v. Stewart, 9 Wheat., 680.

Where the surety is denied the right of subrogation by conversion of the property, he is discharged by the creditor.

Hurd on Bills and Notes, Sec. 288.
Goodyear v. Barber, 14 Barber, 481.
Oldson v. Morris, 10 Johns, 539.
Brandt on Suretyship and Guaranty, 214.

Material alteration of an instrument. A mortgage that has been materially altered or multilated is but a cloud on the title of the land of the mortgagor.

Smith v. Fellows, 41 N. Y., Sup. Ct., 36.
M. Gutyer v. Velte, 133 Pa. St., 350.

Such alterations prevents a foreclosure; there is no lien.

Cutler v. Rose, 35 Iowa, 456.

Johnson v. Moore, 33 Kan., 90.
Coles v. Yorks, 28 Minn., 464.
Perea v. Federick, 17 Neb., 117.
Worring v. Smith, 2 Barb. Ct. N. Y., 119 (47 Am. D. C. 299).
Marcy v. Dunlap, 5 Lans (N. Y.), 366.
Hallingsworth v. Holbrook, 80 Iowa, 151.
Powell v. Pearlstine, 43 S. C., 403.

A material alteration of a bond after the execution, vitiates it.

Mortin v. Thomas, 24 How. (U. S.), 315.
Reese v. United States, 9 Wall., 13.
Smith v. United States, 2 Wall. (U. S.) 219.

A *fortiori* will render the mortgage here invalid and will not bind the surety. Change in the description of the property whereby its identity is changed, the identity of the subject-matter is changed or its quantity increased or diminished, is a material alteration.

In Morcy v. Dunlap, 5 Lans (N. Y.), 365, the description was changed in a mortgage where a married woman had given a mortgage on her separate property to secure the debt of her husband. Where the lot was described by the wrong number and it was changed without her knowledge. On foreclosure, the court held it vitiated the mortgage. She was a mere surety, as here R. E. Daggs, appellant, is a mere surety.

Same in Perea v. Frederick, 17 Neb. 117, an alteration of 1 and 2 to 13 and 14, held material and that vitiated the mortgage.

In Montage v. Linn, 23 Ill., 551, the figure 24 was changed to 25, was held material and vitiated mortgage. In Chasley v. Frost, 1 N. H., 145, figure 5 was changed to 15 in description, held material and vitiated mortgage.

In Sherwood v. Merritt, 83 Wis., 223, the addition of the

words " more or less " was a material alteration and vitiated the contract.

In this case these words were scratched out.

It is a principal of universal application that a material alteration of a written instrument renders it void.

Angle v. N. W. Mut. Life Ins. Co., 92 U. S., 330.
Evans v. Lawton, 34 Fed. Rep., 233.

If it avoids the instrument it discharges the surety.

Miller v. Stewart, 9 Wheat. (U. S.), 680.
Bowers v. Cobb, 31 Fed. Rep., 678.
Paine v. Jones, 76 N. Y., 274.
Edmonds v. Draper, 5 Pet. (U. S.), 624.

Burden of proving an altered instrument is on the party who brings it forward. This mortgage bears on its face a suspicious character. An erasure appears, wiping out the entire description of a part of the property assumed to be under the mortgage given by the surety. This being a surety mortgage carries a double suspicion. He has the right to stand on the very terms of his mortgage—no more, no less; no matter whether for or against his interest. It is apparent on the face of this mortgage it could not be foreclosed against this land because of no description. It is not certain where this property is. It is not certain that it was intended to be mortgaged at all. The other descriptions have the full descriptions to them. The rule in such cases in this court is that the burden is on the appellee to prove the alteration was made before it was signed.

Cox vs. Palmer, 1 McCrary (U. S.) 431.

It is the duty of the court to refuse to let the altered paper go into the evidence.

Parsons First National Bank v. Franklin, 20 Kan., 264.
Smith v. United States, 69 U. S., 219. (2 Wall. 219.)

Any unauthorized variation in an instrument a surety has signed changing his agreement will discharge the surety from his obligation.

Russell v. Payton, 4 Ill. App., 473.
Neill v. Case, 25 Kan., 510.
Stillwell v. Patton, 108 Mo., 352.
Paramore v. Lindsay, 63 Mo., 63.
Beamont v. Russell, 20 Vt., 205.
Johnson v. First National Bank, 28 Neb., 792.
Hortley v. Corby, 150 Pa. St., 23.

The one who must recover on his evidence must make out his case. If his evidence is mutilated he must explain it.

Dodge v. Haskell, 69 Me. St., 29.
Ely v. Ely, 6 Gray (Mass.), 439.
Reed v. Kemp, 16 Ill., 445.
Comstock v. Smith, 26 Mich, 306.

"A material alteration of a written contract by a party to it discharges a party who does not authorize or consent to the alteration, because it destroys the identity of the contract and substitutes a different agreement for that into which he entered."

Hersman v. Werges, 112 U. S., 141.

The burden is on him who produces a scratched instrument, where objected to, to explain it. If he proves the signature and explains the erasures he shifts the burden on to the opposition to break his *prima facie* case down. Appellee failed to do either.

Hill v. Nehus, 86 Ala., 442.
Wisdom v. Reeves, 110 Ala., 418.
McAlister v. Avery, 17 Ill. App., 568.

Assignment of Error No. XVII,

relates to testimoney introduced by the appellee over the objection of appellant under a notice marked C. H. H., copied in full in the assignment, together with the evidence contended to be prejudicial. It shows on its face the strongest evidence of its invalidity. Such a notice is no notice to produce papers.

Notwithstanding the original of duplicates was in court, (Rec. page 126) and the copy of it also (Rec. page 126). This witness under the above notice was permitted to give oral testimony contradicting both original and copy about matters in both papers (Rec. page 127). This witness then testified that the water rights had been taken in consideration of the three notes (Rec. page 126), and said "and the bank agreed to give them back everything that they at that time held and took those three notes with the water rights in consideration of it." This is an appalling statement in view of the written contract (Rec. p. 69, and p. 104, and p. 57), where the other counsel for the appellee, Mr. Ives in Mr. Chalmers presence said: "There is an answer here and under the answer of A. J. Daggs, it is to the effect that we have converted these water rights. We are ready to deposit these with the clerk, and after our notes are paid and satisfied they may be delivered. If not satisfactory, that they may be returned to us. We make this offer in order to do away with the allegation of conversion." He could not have taken the water rights in consideration of the three notes when the contracts say on their face they sold the $5,000 note and litigation, and

the overdraft and collateral attached to it, and in selling the overdraft and collateral they say they sold it without recourse on it to the Phœnix National Bank.

We contend most seriously that the giving of that notice was only a subterfuge to go behind to let the witness testify false before the court. The witness had the copy of the contract and the original of the duplicates there. It requires no notice to produce, to introduce one of the duplicates. Under such a notice over objection it is error to allow such evidence admitted.

Thompson on Trials, 750, 759, 760, 780.
Alney v. Halcliff, 37 Hun. (N. Y.), 286.
Revised Statutes of Arizona, Par. 1861.

"Sec. 37. Any court in which an action is pending, or a judge thereof, may upon notice, order either party to give to the other within a specified time, an inspection and copy, a permission to take a copy, of any book, document or paper in his possession or under his control, containing evidence relating to the merits of the action, or defense therein. If compliance with the order be refused, the court may exclude the book, document or paper from being given in evidence; or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party refusing, for contempt. This section shall not be construed to prevent a party from compelling another to produce books, papers or documents when he is examined as a witness."

Assignment of Error No. XVIII

relates to the proceeding of the district court in proceeding with the trial over objection, on the ground that as to appellant A. J. Daggs, there was no issue, for the

reason there was no pleadings on the part of the plaintiff, no reply to raise an issue to be tried.

The objections were made throughout to the entire second trial (beginning on Record pp. 120, 122, 125, 131) and exceptions taken at the time of the overruling of the same. Appellant contends under the pleadings there was no issue, and hence this entire second trial was an error, there being no issue under the pleadings to be tried.

"Where the ultimate fact is admitted on the record, probative facts tending to establish, modify, or overcome it, are not the proper subject of judicial action." Rhodes, J., in

Mulford v. Estidillo, 32 Cal., 139.
Johnsons Bliss on Code Pleading, 397.
Camp v. Lassen, 67 Cal., 139, 599.

The authorities cited under Assignments IV, VIII, and IX, sustain this view, that the facts being admitted by the pleadings, there was nothing to be tried, no issue, which view appellant held and still maintains and contends for.

Assignment of Errors, No. XIX, XX, XXI, argued together.

These three assignments relate to the statement of facts, as required on appeals by 18 Stat. at Large, p. 27, being Act of Congress, April 7, 1874, Chap. 80, being 1 Sup. R. S., 13, being Organic, Act Arizona Territory, Sec. 1868.

The Honorable Court refused appellants application by mandamus to have the court below make another statement of facts, than the one that appears in Rec. p. 158. The question is upon that statement of facts. Does it sus-

tain the judgment of the court below? Appellee sued on three promissory notes. The statement of facts does not mention the three notes, the interest, the mortgage, nor any fact connected therewith. The appellants sued on three counterclaims, and failure of consideration by the surety; not one of these are mentioned or any fact connected therewith. Although 55 pages of oral testimony appears in the case, not one ultimate fact out of it is mentioned in the whole so-called statement of facts.

We submit such a statement is not a statement of facts and will not sustain any judgment.

The findings should cover the essential facts upon which must exist and concur to constitute a right of action.

Smith v. Sac County, 11 Wall., 139, 428.
Copeland v. Ins. Co., 9 Wall., 461.
Ins. Co. v. Tweed, 7 Wall., 44, reading p. 51.
Edington v. Richardson, 10 Wall., 516.
Norris v. Jackson, 9 Wall., 125.
Flounders v. Tweed, 9 Wall., 425.
Jenison v. Lenard, 21 Wall., 302.
Melendy v. Rice, 94 U. S., 796.
Gillman v. Ill. M. T. Co., 91 U. S., 603.

This statement of facts is not even a mere recital of the evidence. It does not approximate to a statement of facts in any particular.

Lehren v. Dickson, 148 U. S., 71.

The only way to show a finding of facts is not a finding, is to show an affirmative.

To brief a negative can only be done by showing an affirmative ought to appear.

The opinion of the lower court assigning reasons for its conclusions cannot be treated as a findings of fact.

British Queen Mining Company v. Baker Silver Mining Company, 139 U. S., 222.

Opinion cannot be resorted to to help the findings of facts.

Saltonstall v. Birtwell, 150 U. S., 417.

If there were findings in the district court, adopted by the lower court it might be resorted to, but there is none. There is nothing to show the judgment of the lower court was right. The record shows the judgment wrong.

Watch Mining Company v. Crescent Mining Company, 148 U. S., 293.

Where there are no facts stated by the lower court in its statement of facts, nothing is offered to sustain the judgment.

Young v. Amy, 171 U. S., 179.

Court will review findings of facts with exceptions, to see if it supports the judgment.

Seeberger v. Schlesinger, 152 U. S., 581-586.
Allen v. St. Louis Bank, 120 U. S., 20-30.
Insurance Company v. Born, 95 U. S., 117-125.
Tyng v. Grinnell, 92 U. S., 467-469.
St. Louis v. Ferry Company, 11 Wallace 423-428.

Upon an appeal from a Territorial court, the United States court will decide whether the judgment or decree is supported by the facts as found by the court, and upon admission or rejection of evidence where *exception* is taken. It cannot in such case consider the weight of the evidence, nor its sufficiency to support the findings of the court.

Idaho & O. Land Co., v. Bradbury, 132 U. S., 509.
San Pedro, etc., Co., v. U. S., 146 Id., 120.
Smith v. Cole, 144 Id., 509.
Haws v. Victoira Copper Co., 160 Id., 303.
Gildersleeve v. New Mex. Min. Co., 161 Id., 303.

Same rule applies where jury is waived and court tries cause.

Mammoth Min. Co. v. Salt Lake Machine Co., 151 U. S., 447.
Grayson v. Lynch, 163 Id., 468.

This court will review the objections when exceptions are duly taken to see if the findings of facts are based on the illegal rulings, injurious to the appellant.

Young v. Amy, 171 U. S., 179.
Mining Co. v. Taylor, 100 U. S., 37, 42.
Home Ins. Co. v. Balt. Warehouse Co., 93 U. S., 527, 547.
Railroad Co. v. Pratt, 22 Wall., 123.
Packet Co. v. Clough, 20 Wall., 528, 542–3.

This court will examine the evidence at large to see whether the objections and exceptions are well taken at the trial under the theory of the pleadings.

Smith v. Sac. Co., 11 Wall., 139, *supra.*
Mammoth Mining Co. v. Salt Lake Foundry Co., 151 U. S., 447.
Runkle v. Brougham, 153 U. S., 216, reading page, 222.
Haws v. Victoria Mining Co., 160 U. S., 303.

In Glendersleeve v. New Mex. Mining Co., 163 U. S., 109, reading page 118, this court said: "It has been frequently held that the authority of this court on appeals is limited to determining whether the court's findings of

facts support its judgment or decree, and whether there is any error in rulings duly excepted to in the admission and rejection of evidence."

Harrison v. Perea, 168 U. S., 311.

Conclusion.

We ask the court to examine the whole case and give us judgment according to the law and the right of the case.

Respectfully submitted,

A. J. DAGGS,

Attorney for Appellants.

No. 138.

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Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

Filed Nov. 27, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

A. J. DAGGS,
R. E. DAGGS,
Appellants,
vs.
THE PHŒNIX NATIONAL BANK.,
} No. 138.

Motion Suggesting Diminution of Record and for Certiorari.

A. J. DAGGS,
Attorney for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1899.

A. J. DAGGS,
R. E. DAGGS,
Appellants,
vs.
THE PHŒNIX NATIONAL BANK.
No. 138.

Appeal from the Supreme Court of the Territory of Arizona.

Comes now the said Appellants, by their counsel, and suggests diminution of the record in this court, in this, to wit:

1. There is no statement of fact in the nature of a special verdict, or objections to the rulings on admission or rejection of evidence, and exceptions thereto, made and certified by the Supreme Court of Arizona Territory in the transcript of record filed in this court in this case, and the same is omitted from the transcript.

REASONS FOR DELAY.

RULE 14.

Appellants show to this court as their special reasons why the above suggestion was not made at the first term of the entry of this cause.

1st. Judgment was rendered in this case April 16, 1898, by Supreme Court of Arizona Territory.

2d. That Appellants made their application for allowance of appeal, to this court, and same was allowed on June 6, 1898. That the transcript of the record of this case was lodged with the Clerk of this Court August 6, 1898, and was filed September 19, 1898; that Supreme Court of Arizona Territory did not meet until second Monday in January 1899; that when such court met Appellants called attention to and asked that statement of facts and objections to rulings on admission and rejection of evidence and exceptions thereto be made, and court intimated that it would be done. That thereafter, at same term, on May 31, A. D. 1899, after service on Appellee's counsel, on May 29, A. D. 1899, Appellants filed their notice and motion in Supreme Court of Arizona Territory asking that a statement of facts and objection to rulings, etc., be made and filed *Nunc pro tunc* as of date of rendition of judgment. That said court remained in session two days and had such motion in their possession during all such time. Appellants pressed for ruling. The court on June 2, A. D. 1899, made the following minute entry: "In this cause it is ordered that the motion for the court to sign and file statements of facts, filed herein by Plaintiff in Error be submitted," and thereupon immediately made the following order: "It is ordered that this court stand adjourned *sine die*."

That thereafter, on October 30, 1899, a special session of the Supreme Court of Arizona was held.

That on November 1, 1899, said court adjourned to January 6, 1900, by the following order: "It is ordered that this court stand adjourned until January 6, 1900."

That thereafter, on November 2, A. D. 1899, there was filed in the office of the Clerk of the Supreme Court a paper purporting to be the statement of facts in this case, and the same is now on file in the court below as part of the record in this case.

That Appellants filed their objections thereto. Having theretofore tendered their statement of facts and objections to rulings on admission and rejection of evidence and exceptions thereto, and same are on file in court below as part of the record in this case.

Wherefore the said Appellants moves the Honorable Court, under Rule 14, to award a writ of certiorari to be issued, and directed to the Judges of said Supreme Court of the Territory of Arizona, commanding them that, searching the record and proceedings in said cause, they forthwith certify to this court those parts of said record so omitted as aforesaid, to wit: the notice and motion of appellants filed May 31, A. D. 1899, and the rulings and orders thereon; the statement of facts, made by the court below in this cause; also the objections of the Appellants to said statement of facts; also the statement of facts and bill of exceptions tendered by the Appellants, now on file in the Supreme Court of Arizona Territory.

A. J. DAGGS,
Attorney for Appellants.

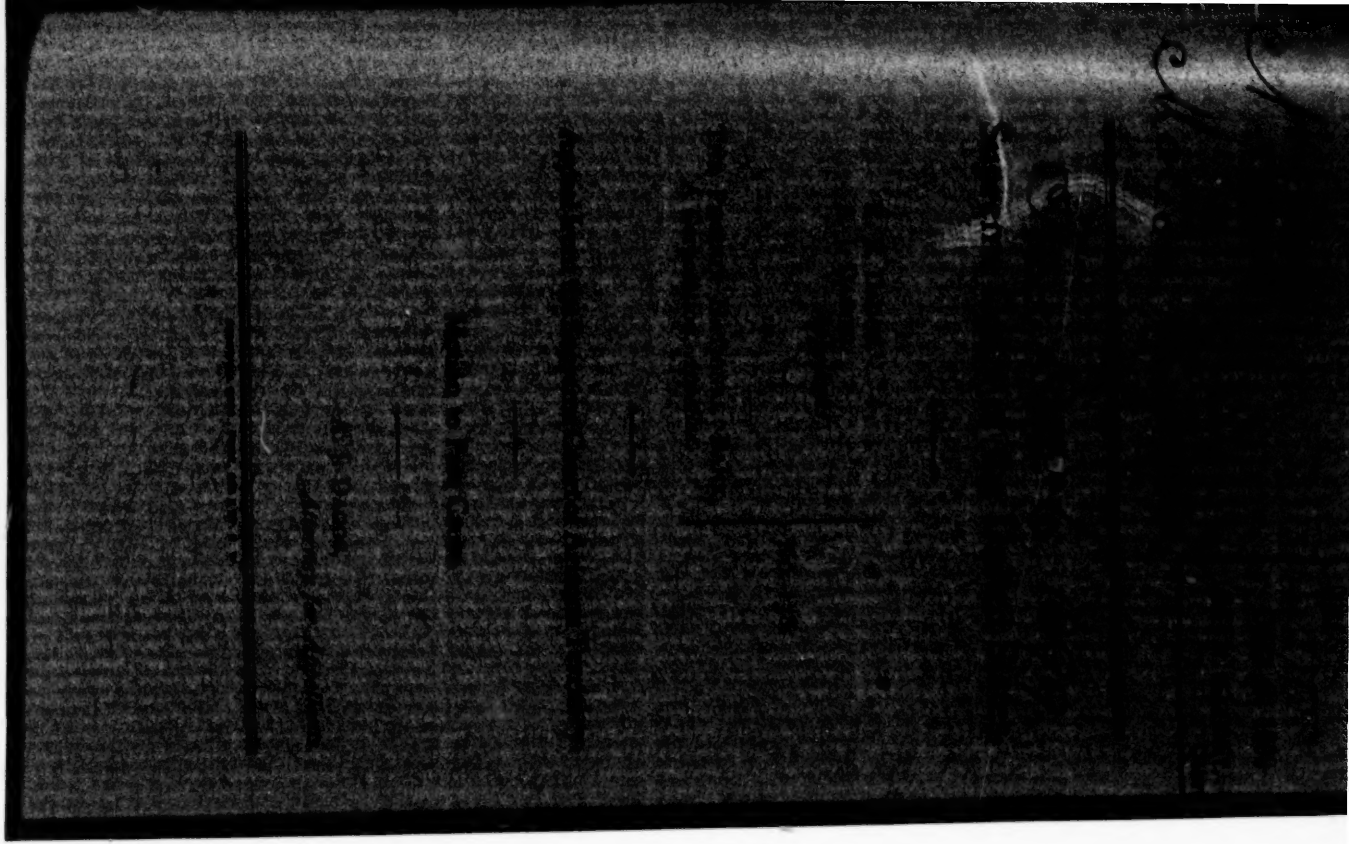
DISTRICT OF COLUMBIA, }
WASHINGTON CITY, } *ss:*

A. J. Daggs, being duly sworn, deposes and says that he is one of the Appellants in the above entitled cause. That he has read the above and foregoing motion and knows the matters and facts therein stated are true.

A. J. DAGGS.

Subscribed and sworn to before me this 22d day of November, 1899.

[SEAL.] JAMES D. MAHER,
Notary Public, District of Columbia.



IN THE

Supreme Court of the United States.

R. E. DAGGS,
A. J. DAGGS,
Appellants,

vs.

THE PHŒNIX NATIONAL BANK,
A Corporation, *Appellee.*

No. 138.

Appeal from the Supreme Court of Arizona Territory.

Motion to Pass Cause.

Comes now the appellants by counsel herein and moves the Honorable Court to pass and continue this case from its regular call on the docket and place it at the foot of the docket and for reasons and grounds therefor allege and show.

NOTICE.

TO THE PHŒNIX NATIONAL BANK, *Appellee:*

Take notice that on December 7, 1899, at the court room of the Supreme Court of the United States in the

city of Washington, D. C., at the opening of said court at 12 o'clock of said day, or as soon thereafter as the court will permit, appellants will move said court to continue and pass this case from its regular call to the foot of the docket.

A. J. DAGGS,
Attorney for Appellants.

That the appeal herein was allowed by a Justice of this Court on June 6, A. D. 1898.

That on August 6, 1898, the parts of the record then on file in the court below was lodged with the clerk of this Court and on September 19, A. D. 1898, filed.

That the Supreme Court of Arizona was not in session on June 6, 1898, and did not meet again until second Monday in January, 1899, and during all the time between June 6, 1898, and second Monday in January, 1899, there was no opportunity to move the Supreme Court of Arizona to make and "certify the rulings of the court on the admission and rejection of evidence when excepted to" in this cause.

That when the Supreme Court of Arizona did meet in January, 1899, appellants moved orally, as is the usual and customary practice in such cases in that court, for the court to make and "certify the rulings of the court on the admission and rejection of evidence when excepted to" in this cause, and the court said it should be done.

That delay happened and the said Bill of Exceptions was not made, and on May 31, A. D. 1899, the appellants filed the following papers:

IN THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

R. E. DAGGS and A. J. DAGGS,
Plaintiffs in Error,
vs.
THE PHŒNIX NATIONAL BANK,
A Corporation,
Defendant in Error.
} Notice.

To the Pœnix National Bank and L. H. Chalmers, its attorney of record, take notice that above-named plaintiffs in error will present the original "Statement of Fact" and "Objections and Exceptions to Admissions and Rejection of Evidence," as shown by the record, a copy of which is herewith served on you, to the court in this cause on June 1, A. D. 1899, at 10 o'clock A. M. of that day, or as soon thereafter as counsel can be heard, and will there move the court to sign and certify same, and for order allowing same to be filed *nunc pro tunc* as of date April 16, 1898, the date of rendition of judgment by this Court in this case.

A. J. DAGGS,
Attorney for Plaintiffs in Error.

Rec. service within notice this May 29, 1899.
L. H. CHALMERS,
Atty. for Deft. in Error.

Filed May 31, 1899.
LLOYD JOHNSTON,
Clerk.

IN THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

R. E. DAGGS and A. J. DAGGS, *Appellants and Plaintiffs in Error,* *vs.* THE PHŒNIX NATIONAL BANK, A Corporation, *Appellee and Defendant in Error.*	Motion to Court to sign and file statement of facts and objections and exceptions to evidence.

Comes all the appellants by their attorney, A. J. Daggs, and moves the court to sign and certify the "Statement of Facts" and "Objections and Exceptions to Admissions and Rejection of Evidence" in this cause, as shown by the record, and order the same to be filed by the clerk of this court *nunc pro tunc*, as of date April 16, A. D. 1898, the day of rendition of judgment by this court in this cause.

A. J. DAGGS,
Attorney for Appellants.

Rec. service copy within motion this May 29, 1899.
L. H. CHALMERS,
Atty. for Deft. in Error.

Filed May 31, 1899.
LLOYD JOHNSTON,
Clerk.

That the court below was in session thereafter on June 1st and 2d, and appellants on opening of court on June 1, 1899, called up their motion and ask for a ruling, and then again on June 2, 1899, pressed for ruling, at the same

time tendered their "objections to the rulings of the court on the admission and rejection of evidence when excepted to" for adoption, and the court below on June 2, 1899, made the following order: "In this cause it is ordered that the motion for the court to sign and file statement of facts filed by the plaintiff in error be submitted" and thereafter immediately made the following order: "It is ordered that this court stand adjourned *sine die*."

SUPREME COURT, }
Territory of Arizona. } *ss:*

I, Lloyd Johnston, Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true, and correct copy of the Notice of Application to Supreme Court to make motion asking Court to make Statement of Facts, the motion, the order submitting motion, and the order adjourning Court June 2, 1899, *sine die*.

I further certify that this is all the record concerning the said motion in the said above-entitled cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said Court this 22d day of August, A. D. 1899, at Phœnix, Arizona.

LLOYD JOHNSTON,

[SEAL.] *Clerk Supreme Court,*
Territory of Arizona.

The motion referred to in this order is the same motion hereinbefore copied.

That delay again happened. The court below held a special session on October 30, A. D. 1899. Appellants again ask for a ruling on their motion to the court to make and "certify rulings of the court on the admission and rejection of evidence when excepted to" and tendered their "objections to ruling on evidence and exception," and the court on November 1, A. D. 1899, made the following order: "It is ordered that this court stand ad-

journed until January 6, A. D. 1900," and although the above motion copied herein had been on file since May 31, 1899, and submitted some five months, still the court below did not rule on it, for or against the appellants, neither did the court below accept or refuse the "rulings of the court on the admission or rejection of evidence and exceptions thereto" made and tendered by the appellants, neither did it make or certify "the rulings of the court on the admission or rejection of the evidence when excepted to on its own motion" as appears by the record on file in this cause in that court, neither would it refuse to do it, and delay is again happening at no fault of appellants.

That the record in this cause as it now stands, is first, all such papers as were on file in the court below on June 6, 1898, are transcripted and on file in this Court; second, that a so-called statement of facts was made and filed in court below November 2, 1899, and is still on file in that court. Third, the court below has never made or "certified the rulings of the court on the admission or rejection of evidence when excepted to," although the motion asking such court to do so has been submitted now more than five months and such court has been twice in session and adjourned to meet again January 6, 1900.

That this cause will possibly be reached on its regular call in this Court before the holidays and appellants do not desire to encumber this court with a piecemeal or improper record.

That, although appellants have been notified by the clerk of this court to provide for the printing of the record, and appellants are ready and want to do so, yet, the record, in its present detached and fragmentary state can not be printed and brought properly before this court so as this court can pass upon the merits of this case without the "certified rulings of the court on the admission and rejection of evidence when excepted to" (or Bill of Exceptions).

That there are in the record and proceedings in this

cause many rulings of the court to the admission and rejection of evidence, duly excepted to by appellants, which rulings are prejudicial to appellants' rights, as they believe, and this court will not review the evidence without the rulings of the court below on the admission and rejection of evidence when excepted to, unless the same are duly certified to this court by the court below.

That this motion is not made for vexation or delay, but to save substantial rights. Wherefore, appellants pray this Honorable Court to pass and continue this case to the foot of the docket, and consolidate and hear this motion with appellants motion for certiorari in this cause, and indicate such practice as will be proper to save the substantial rights of the appellants in the premises that justice may be done.

A. J. DAGGS,
Attorney for Appellants.

DISTRICT OF COLUMBIA, } *ss:*
Washington City. }

A. J. Daggs, being first duly sworn says that he has read the above and foregoing motion and knows the matters and facts therein stated are true.

.....

Subscribed and sworn to before me this 6th day of December, 1899.

.....
Notary Public.

My commission expires.....

MOTION

No. 442, 138

Br. of Britton & Browne for Appellee on mo.

SUPREME COURT U. S.
FILED
OCT 14 1898
Clerk.

Supreme Court of the United States.

October Term, 1898.

Filed Oct. 14, 1898.

A. J. DAGGS,
R. E. DAGGS,
APPELLANTS,
v.
THE PHŒNIX NATIONAL BANK.

No. 417

Appeal from the Supreme Court of the Territory of Arizona.

Motion to Vacate Supersedeas Bond or for Additional Security.

A. T. BRITTON,
A. B. BROWNE,
Attorneys for Appellee.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

A. J. DAGGS,
R. E. DAGGS,
APPELLANTS,
v.
THE PHŒNIX NATIONAL BANK.

No.

MOTION TO VACATE SUPERSEDEAS BOND OR FOR ADDITIONAL SECURITY.

Now comes The Phœnix National Bank, appellee, and by its counsel, in above-entitled cause, respectfully moves this honorable Court that the supersedeas herein be vacated, or other security be required, and that the amount of supersedeas bond be increased to the sum of $10,000. And in support of this motion submits the accompanying proof.

A. T. BRITTON,
A. B. BROWNE,
Atty's for Appellee.

To A. J. DAGGS and R. E. DAGGS,

Appellants:

Please take notice that on Monday, the 17th day of October, 1898, at the Court room of the Supreme Court of the United States, in the city of Washington, at the opening of said Court at 12 o'clock of said day, or as soon thereafter as counsel can be heard, the appellee, The Phœnix National Bank, will move said Court to vacate the supersedeas, or to increase the supersedeas bond given by you in said cause and for other and additional security. Said motion will be heard upon the certificates and affidavits whereof copies are hereto annexed.

A. T. BRITTON,
A. B. BROWNE,
Atty's for Appellee.

STATEMENT.

The appellee Bank seeks to foreclose 4 mortgages on certain realty of appellants given to secure an indebtedness amounting, with interest and costs, to over $12,000. Decree of foreclosure was entered in the trial court and affirmed on appeal by the Supreme Court of Arizona Territory. (53 Pac. Rep. 201.)

Thereupon appeal was prayed and allowed to this Court, the certificate of the Chief Justice of the Supreme Court of Arizona herewith submitted, reciting :

IN THE SUPREME COURT OF THE UNITED STATES.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiff, Respondent,
v.
A. J. DAGGS and R. E. DAGGS, Defendant and Appellants.

I, Webster Street, Chief Justice of the Territory of Arizona, hereby certify that in the case of The Phœnix National Bank against Daggs, decision of the Territorial Supreme Court was filed April 16, 1896. Soon thereafter, and not later than the 20th day of May, 1898, appellant Daggs presented application for appeal to the Supreme Court of the United States. The appeal was allowed, and the cost bond fixed at the sum of five hundred dollars, and supersedeas bond was fixed at the sum

of ten thousand dollars after full hearing of attorneys at Chambers of condition of mortgage security.

This statement is made at the request of appellees.

WEBSTER STREET.

And the certificate of the Clerk of the Supreme Court of Arizona herewith submitted, which recites:

IN THE SUPREME COURT, *Territory of Arizona*, } ss:

I, Lloyd Johnston, Clerk of the Supreme Court of the Territory of Arizona, do hereby certify, during the month of May, A. J. Daggs, attorney for plaintiff in error in the case of R. E. Daggs *et al. v.* The Phœnix National Bank, did come in this office with several papers to be filed in above case in regard to the appeal to the United States Supreme Court. I said to Mr. Daggs that I could not file his papers until he paid the balance of cost in said case. The said A. J. Daggs did not make a deposit and I did not file the papers at that time by reason of the following rule of our Supreme Court:

"In all civil cases the appellant, or plaintiff in error, "shall deposit with the Clerk of this Court twenty dollars, "and the appellee, or defendant in error, ten dollars.

"The Clerk will not be compelled to docket any case or "to file any paper until such appearance fee is paid. As "soon as the amounts so deposited shall not equal the "costs in this Court of the parties so depositing the same, "then and in every such case the Clerk of this Court may call "upon such party to make an additional deposit of a like "amount, and until such additional amount deposited, the "Clerk will not be compelled to file any papers or do "any other thing in said case for the party that is so in "default."

And I further certify that on the 25th day of June, A. D. 1898, Mr. A. J. Daggs, attorney for plaintiff in error, did come in my office and arrange with me part of the cost in said case, and I therefore filed the following papers: Assignment of errors, allowance for an appeal, appeal bond, citation to the United States Supreme Court, and supercedeas.

In witness whereof I have hereunto set my
[SEAL.] hand and affixed the seal of said court this 3d day of August, A. D. 1898, at Phœnix, Arizona.

[Signed] LLOYD JOHNSTON,
Clerk of the Supreme Court of the Territory of Arizona.

Ignoring this action by Chief Justice Street, appellants thereafter applied to the Justice of this Court assigned to the Ninth Circuit, representing to the said Justice, as counsel are informed, that the Court below refused to act upon the application for appeal.

The Hon. Justice of this Court thereupon, on June 6, 1898, allowed an appeal fixing the supersedeas bond at $4,000, and accepting and approving the bond tendered on June 18, 1898, upon presentation of two certain telegrams, one understood to be from a bank in Arizona, and directing that such telegrams be attached to said original bond and filed therewith with the Clerk of the Supreme Court of Arizona.

On that point we submit the following certificate from said Clerk:

IN THE SUPREME COURT, *Territory of Arizona*, } *ss*:

I, Lloyd Johnston, Clerk of the Supreme Court of the Territory of Arizona, do hereby certify that there were no

letters or telegrams filed with the supersedeas bond in the case of R. E. Daggs *et al. v.* The Phœnix National Bank, nor was there anything filed with said supersedeas bond tending to show why said bond was allowed.

I further certify that the only papers filed in this office pertaining to this appeal up to the present are the following: Allowance of an appeal, appeal bond, assignment of errors, citation, supersedeas.

In witness whereof I have hereunto set my hand and affixed the seal of said Court this 3d day of August, A. D. 1898, at Phœnix, Arizona.

[COURT SEAL.] (Signed) LLOYD JOHNSTON,
Clerk of the Supreme Court
of the Territory of Arizona.

And the following affidavit:

IN THE SUPREME COURT OF THE UNITED STATES.

PHŒNIX NATIONAL BANK, a Corporation, Respondent,
v.
A. J. DAGGS & R. E. DAGGS, Appellant.

TERRITORY OF ARIZONA, *County of Maricopa*, } *ss:*

William Christy, being first duly sworn, deposes and says:

That he is President of the Valley Bank of Phœnix, Arizona.

That on or about the 17th day of June, 1898, one A. J. Daggs exhibited to him a list of property, which he, the said A. J. Daggs, stated was a list of the property owned by William M. Billups in Maricopa County, Arizona Ter-

ritory; that said Daggs represented that said William M. Billups owned said property, and that it was free from all incumbrances. Relying upon this list of property and believing that it was unincumbered, I telegraphed Hon. Joseph H. McKenna, at the request of said A. J. Daggs, as follows:

"We consider William M. Billups responsible for "$4,000; has property here considered worth $25,000."

Affiant further says that he has, on this day, been shown an abstract of all of the property owned by William M. Billups in Maricopa County, Arizona, which abstract is certified by the Phœnix Title, Guaranty and Abstract Company to be all the real estate owned by said William M. Billups in Maricopa County.

And affiant further says that he finds, upon an examination of said abstract, that all the property owned by said William M. Billups is seriously incumbered; that at this time affiant does not believe said William M. Billups is good financially as a surety on a bond for the sum of four thousand dollars ($4,000).

Affiant further says that at the time he sent the telegram referred to he did so upon the assurance that the list shown him was correct, and upon the further assurance that the property contained in the list was free and clear of all incumbrances.

(Signed) WM. CHRISTY.

Subscribed and sworn to before me by the said William Christy this 8th day of August, A. D. 1898.

[SEAL.] THOS. D. BENNETT,
Notary Public.

My commission expires September 13, 1899.

The certificate of The Phœnix Title, Guaranty and Abstract Co., referred to in foregoing affidavit, is herewith submitted and reads as follows:

(Copy.)

PHŒNIX, ARIZONA, *August* 1, 1898.

We do hereby certify that the following two (2) pages show all the real estate of William M. Billups in Maricopa County, Arizona Territory, as the same appears of record, together with the incumbrances thereon.

[SEAL.] THE PHŒNIX TITLE, GUARANTY AND ABSTRACT CO.,
(Signed) By CHAS. H. MOORE,
Manager.

(Copy.)

List of Real Estate belonging to William M. Billups in Maricopa County, Arizona Territory, with incumbrances thereon:

The N.W. ¼ of the S.E. ¼ of Sec. 10, T. 1 North, Range 5, which appears to be without incumbrance, except the judgments.

The N. ½ of Sec. 19, T. 1 South, Range 5 East.

Subject to mortgage from A. J. Daggs to P. J. Cole, dated May 18, 1894, recorded in Book 18 of Mortgages at page 505, on N.W. ¼ of Sec. 19, T. 1 S., R. 5 E., except the East 51.53 acres (and other land) given to secure a note for $9,000.00, dated the 17th day of May, 1894, due in one year with interest at 1¼% per month.

Also subject to mortgage from R. E. Daggs to Phœnix National Bank, dated the 28th day of November, 1894, recorded in Book 20 of Mortgages, at page 205, on the N.E. ¼ and the East 53.33 acres of the N.W. ¼ of Sec. 19, T. 1 S., R. 5 E. (and other land), given to secure a note dated Nov. 1, 1894, for $9,741.73, due in one year, with interest at 10% per annum. Suit for foreclosure of this mortgage has been appealed to the Supreme Court of the United States.

Also subject to mortgage, from A. J. Daggs to Phœnix National Bank, dated the 28th day of November, 1894, on the N.W. ¼ of Sec. 19, T. 1 S., R. 5 E., except the East 51.53 acres (and other land), recorded in Book 20 of Mortgages, at page 208, given to secure a note dated November 1, 1894, for $9,741.73, due on or before one year, with interest at 10% per annum. Suit for foreclosure same as above.

Also subject to the following tax sales :

Certificate No. 38, year 1893, on N.E. ¼ of N.E. ¼ of N.E. ¼, $23.15.

Certificate No. 39, year 1893, on 55½ acres of E. ½ of N. W. ¼, $10.03.

Certificate No. 77, year 1890, on N.E. ¼, $8.74.

Certificate No. 96, year 1894, on S. ½ of N.E. ¼, $27.25.

Certificate No. 391, year 1896, on W. 15 acres of N.W. ¼ of N.W. ¼, $74.56.

Certificate No. 343, year 1897, on 1 acre in N.W. cor. of N. ½, Sec. 19, $75.89.

The S. ½ of the N.E. ¼ of S.W. ¼ of Sec. 3, T. 1 S., R. 5 E.

Subject to tax deed dated June 14, 1898, to W. K. James, on the N. ½ of S. ½ of N.E. ¼ of S.W. ¼ of Sec. 3, T. 1 S., R. 5 E., for taxes of year 1896.

Also lots 2 and 3 in block 14 in Collins' Addition to the City of Phoenix, subject to judgments only.

Judgments against William M. Billups:

No. 2217, in favor of Arizona Central Bank, dated June 9, 1896.

Balance due on judgment May 25, 1897, $76.45.

No. 2362, in favor of Utah Irrigating Ditch Co. *et al.*, dated November 27, 1896, for the sum of $256.25 costs.

We present also the certificate of the County Assessor, as follows:

Certificate of County Assessor.

Maricopa County, Arizona Territory.

Name of tax payer: Wm. M. Billups.

Property:

N.E. ¼ of Sec. 10, T. 1 N., R. 5 E., 160 acres, val.		$1,760.	Imps.	$300.
N.W. ¼ of S.E. ¼, Sec. 10, 1 N., R. 5 E., 20 acres,	"	275.		
N.E. ¼ of N.W. ¼, Sec. 10, 1 N., R. 5 E., 40 acres,	"	440.		
S. ½ of N.E. ¼ of S.W. ¼, Sec. 3, T. 1 S., R. 5 E. ..... 20 acres,	"	240.		
Lots 2 and 3 in block 14 Collins Add. (to Ph.)	"	220.	Imps.	1,200.
2 stallions, $200. Cow, $25. Buggy, $25. 1 wagon, $25. 2 harness, $10. 1 mower, $15. 25 S. horses, $375, H. & K., $100—Total $775.				
		$775	$2,935	$1,500
Total assessment.....				$5,210

Name of tax payer: The London Co.

Property:

N. ½ of Sec. 19, Tp. 1 S., R. 5 E., 320 acres. Val. $2,560.

TERRITORY OF ARIZONA, } ss:
County of Maricopa. }

I, Frank Luke, County Assessor in and for the County of Maricopa, and Territory of Arizona, do hereby certify that the foregoing page shows a true and correct copy of the assessment of Wm. M. Billups, including all real and personal property, as appears of record on page 57 of Book 1 of the Duplicate Assessment Roll of said Maricopa County, Arizona Territory, for the year 1898.

I further certify that the foregoing page shows a part of the property assessed to the London Co., as appears of record on page 92 in Book 3 of the Duplicate Assessment Roll of Maricopa County, Arizona Territory, for the year 1898, and that said showing is true and correct.

I further certify that in my judgment the said foregoing described property is listed and assessed at its cash value.

In witness whereof, I have hereunto set my hand this 9th day of August, A. D. 1898.

FRANK LUKE,
Assessor.

There is also submitted the following affidavit:

IN THE SUPREME COURT OF THE UNITED STATES.

PHŒNIX NATIONAL BANK, a Corporation, Respondent,
v.
A. J. DAGGS and R. E. DAGGS, Appellants.

TERRITORY OF ARIZONA, } ss:
County of Maricopa. }

Jerry Millay, being first duly sworn, deposes and says: That he has lived in Maricopa County, Arizona, for six-

teen years last past; that he is well acquainted with real estate values in said County and Territory, and at one time was engaged in loaning money thereon; that he knows the property owned by William M. Billups, as shown by the records of Maricopa County, and has examined the incumbrances thereon; that in his opinion nothing could be collected from said William M. Billups under execution; that he does not consider that said William M. Billups would be good for any amount of money whatsoever on an appeal bond or upon any other kind of a bond.

(Signed) JERRY MILLAY.

Subscribed and sworn to before me this 15th day of August, A. D. 1898.

[SEAL] LAVINIA M. ANDREWS,
Notary Public.

Commission expires July 15, 1900.

This proof demonstrates the utter insufficiency of the surety—Billups—on the present supersedeas bond, and the manner in which the approval of the honorable Justice was obtained thereto.

The land embraced by the mortgage and foreclosure decree is valuable only by its relation to means of irrigation, and such value can only be determined by knowledge of such local conditions. On that head we submit the following affidavit:

IN THE SUPREME COURT OF THE UNITED STATES.

PHŒNIX NATIONAL BANK, a corporation, Respondent,
v.
A. J. DAGGS and R. E. DAGGS, Appellants.

TERRITORY OF ARIZONA, *County of Maricopa*, } *ss*:

L. H. Chalmers, being first duly sworn, deposes and says that he is attorney for respondent in the above-entitled case; that he has lived in Arizona for fourteen years, and is well acquainted with all the land in Maricopa County, Arizona; that such land and all of it is made fertile and valuable only by means of irrigation; that land under some ditches are more valuable than under other ditches; that any person, in order to estimate the value of land at the present time or what it will be worth in the future, must be well and accurately informed on local conditions.

(Signed) L. H. CHALMERS.

Subscribed and sworn to before me this 15th day of August, A. D. 1898.

[SEAL.] LAVINIA M. ANDREWS,
Notary Public.

Commission expires July 15, 1900.

It is therefore most respectfully submitted that under such proven conditions, the action of the Chief Justice of the Territory in fixing the amount of supersedeas bond in the first instance upon this appeal, and as he here certifies, "*after full hearing of attorneys at chambers of condi-*

" *tion of mortgage security,*" should be accepted, and new and sufficient bond in the sum of $10,000 required.

It will be noted from the accompanying proof that the only pieces of real property owned by the surety, Billups, which is unincumbered is forty acres (N.W. ¼ of S.E. ¼ Sec. 10, Tp. 1 N., R. 5. E.), which the County Assessor reports as valued at $275.00, and lots 2 and 3 in block 14 of Collins' addition to Phœnix, which the Assessor certifies is valued at $220.00. The surety's ownership of land in Sec. 19, Tp. 1 S., R. 5 E., is subordinate to the existing mortgages which are the subject of foreclosure in the present suit (as noted on the abstract) and to tax sales for a number of years past. His ownership of twenty acres in Sec. 3, Tp. 1 S., R. 5 E., is noted upon the abstract as subject to an outstanding tax deed, and the value of this tract is given on the Assessor's certificate as but $240.00. It will also be noted that the Assessor certifies that, in his judgment, the property assessed to this surety is " listed and assessed at its cash value."

Analysis of the abstract of title and the certificate of the County Assessor thus abundantly sustains the statements of the affidavits herewith submitted, showing that the present surety is without financial responsibility justifying his retention upon the supersedeas bond.

Further comment upon the showing submitted is unnecessary.

It is obvious therefrom that the honorable Justice who allowed the supersedeas and approved the bond therefor was not informed of the actual facts. In that view we beg to call to the Court's attention the decision in Railroad Company *v.* Schutte (100 U. S. 644), wherein the syllabus recites:

"A *supersedeas* will be vacated when the approval of " the bond therefor was obtained by fraud and perjury.

"If it appears that the appellant had knowledge of "such fraud and perjury, a new bond will not be ac- "cepted.

"The record in this case not being complete or properly "certified, the Court orders that unless appellant causes "the omissions to be supplied on or before a specified "day, the appeal be dismissed."

We respectfully submit that we are entitled to like relief by vacation of the supersedeas, and refusal to permit new bond in present case upon the showing herewith made.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
Attorneys for Appellee.

APPENDIX.

IN THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

THE PHŒNIX NATIONAL BANK,
Plaintiff, Respondent,
v.
A. J. DAGGS and R. E. DAGGS,
Defendants, Appellants.

Know all men by these presents:

That we, A. J. Daggs and R. E. Daggs, as principals, and Wm. M. Billups, as surety, are held and firmly bound unto the Phœnix National Bank, a corporation, respondent, in the full and just sum of four thousand dollars ($4,000.00), to be paid to the said Phœnix National Bank, a corporation, or its assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated the 25th day of May,

in the year of our Lord, one thousand eight hundred and ninety-eight.

Whereas, lately at a session of the Supreme Court of the Territory of Arizona, in a suit pending in said Court between A. J. Daggs and R. E. Daggs and the Phœnix National Bank, a corporation, a final judgment of affirmance was rendered and entered against the said A. J. Daggs and R. E. Daggs, and the said A. J. Daggs and R. E. Daggs, having obtained an allowance of appeal, and filed a copy thereof in the Clerk's office of the said Supreme Court of the Territory of Arizona, to reverse the said judgment in the aforesaid suit, and a citation directed to the said Phœnix National Bank, a corporation, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 5th day of August, A. D. 1898.

Now the condition of the above obligation is such that if the said A. J. Daggs and R. E. Daggs shall prosecute said allowance of appeal to effect, and answer all damages and costs, if they should fail to make their said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

A. J. DAGGS.
R. E. DAGGS.
WM. M. BILLUPS.

TERRITORY OF ARIZONA, }
County of Maricopa, } *ss:*

Wm. M. Billups, being duly sworn on oath, says that he is a resident, householder, and freeholder in Maricopa County, Arizona; that he is worth the sum for which he has become liable on said bond over and above all just debts and liabilities, exclusive of property exempt from execution.

[SEAL.] WM. M. BILLUPS.

Subscribed and sworn to before me this 25th day of May, A. D. 1898.

R. E. DAGGS,
Notary Public.

My commission expires April 8, 1902.

The above and foregoing bond is this day approved by me this the 18th day of June, A. D. 1898.

JOSEPH McKENNA,
Justice of Supreme Court of U. S.

SUPREME COURT,
Territory of Arizona.

I, Lloyd Johnston, Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the foregoing to be a full, true, and correct copy of the appeal bond filed by the attorney for plaintiff in error, A. J. Daggs, on the 25th day of June, A. D. 1898, in the said above-entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 1st day of July, A. D. 1898, at Phœnix, Arizona.

[SEAL.]

LLOYD JOHNSTON,
Clerk of the Supreme Court.

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, A. D. 1897.

THE PHŒNIX NATIONAL BANK, a Corporation, Plaintiffs, Respondent,
v.
A. J. DAGGS & R. E. DAGGS, Defendants, Appellants,
} Appeal and Allowance.

The above-named defendants, A. J. Daggs and R. E. Daggs, appellants, conceiving themselves aggrieved by the

order and judgment entered on April 16, A. D. 1898, affirming the judgment of the District Court of Maricopa County, Arizona, rendered and entered on the 12th day of November, A. D. 1896, for the principal sum of nine thousand seven hundred and forty-one and seventy-three hundredths ($9,741.73) dollars, and for attorney's fees the sum of two hundred and thirty-four and thirty-nine one hundredths ($234.39) dollars, and for costs and disbursements the sum of ninety-eight and eighty-five one hundredths ($98.85) dollars, making in all the sum of twelve thousand and fifty-two and ninety-four hundredths ($12,052.94) dollars, and that the said sum of nine thousand seven hundred and forty-one and seventy-three hundredths ($9,741.73) dollars bear interest from date thereof at the rate of ten per cent. per annum, and that the said sum of two thousand three hundred and eleven and twenty-one hundredths ($2,311.21) dollars bear interest from date hereof at the rate of seven per cent. per annum. And with a foreclosure of plaintiff's mortgage lien upon the lands and water rights covered by the said mortgage, as it existed on the 28th day of November, A. D. 1894, in the above-entitled proceedings, doth hereby appeal from said order to the Supreme Court of the United States, and they pray that this their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order and judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

A. J. DAGGS.

By ,

Atty. for Defendants, Appellants,
A. J. Daggs and R. E. Daggs,
Phœnix, Arizona.

PHŒNIX, ARIZONA TERRITORY,
April 23, *A. D.* 1898.

And now, to wit, on June 6, A. D. 1898, it is ordered that the appeal be allowed as prayed for.

JOSEPH McKENNA,
Justice Supreme Court, U. S.

SUPREME COURT, }
Territory of Arizona. }

I, Lloyd Johnston, Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the foregoing to be a full, true, and correct copy of the appeal and allowance filed by the attorney for plaintiff in error, A. J. Daggs, on the 25th day of June, A. D. 1898, in the said above-entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 1st day of July, A. D. 1898, at Phœnix, Arizona.

[SEAL.]

LLOYD JOHNSTON,
Clerk of the Supreme Court.

IN THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

PHŒNIX NATIONAL BANK, a Corporation, Respondent.
v.
A. J. DAGGS & R. E. DAGGS, Appellants.

TERRITORY OF ARIZONA, }
County of Maricopa. } *ss:*

Having considered the appellants petition for an allowance of appeal to the Supreme Court of the United States, and it appearing on inspection of said case that a

federal question is involved, and it appearing by affidavit before me that the amount involved in said case is more than the sum of five thousand dollars ($5,000.00), exclusive of interest and costs, and that said case being for the foreclosure of a mortgage lien upon ample and sufficient property to satisfy the judgment and all costs, and that the said property necessarily follows the suit, and said appeal having been allowed, as prayed for in said allowance of appeal, and a supersedeas bond in the sum of four thousand dollars having been presented and approved by the undersigned, it is ordered that all proceedings on said judgment in said case shall be stayed until the proceedings on said appeal in said cause shall be determined by the Supreme Court of the United States, and any remititures heretofore issued shall be forthwith returned (with all record papers) to the Supreme Court of Arizona.

JOSEPH McKENNA,
Justice Supreme Court, U. S.

JUNE 18, A. D., 1898.

SUPREME COURT, }
Territory of Arizona. }

I, Lloyd Johnston, Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the foregoing to be a full, true, and correct copy of the supersedeas filed by the attorney for plaintiff in error, A. J. Daggs, on the 25th day of June, A. D. 1898, in the said above-entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 1st day of July, A. D. 1898, at Phœnix, Arizona.

[SEAL.] LLOYD JOHNSTON,
Clerk of the Supreme Court.

No. 138.
Brief of Browne & Britton for Appellee
Supreme Court of the United States
October Term, 1899
Filed Dec. 2, 1899.
FILED
DEC 2 1899

A. J. DAGGS ET AL.,
APPELLANTS,
v.
THE PHOENIX NATIONAL BANK.

No. 138.

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF IN OPPOSITION

TO MOTION SUGGESTING DIMINUTION OF RECORD AND FOR CERTIORARI.

ALDIS B. BROWNE,
ALEX. BRITTON,
Attorneys for Appellee.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

A. J. DAGGS ET AL.,
APPELLANTS,
v.
THE PHŒNIX NATIONAL BANK.
No. 138.

Appeal from the Supreme Court of the Territory of Arizona.

Brief in Opposition to Motion Suggesting Diminution of Record and for Certiorari.

I.

The motion is too late.

The appeal was allowed June 6, 1898, and docketed in this Court September 19, 1898. Appellants concede that their formal motion for findings or statement of facts was not filed in the Supreme Court of Arizona until May 31, 1899.

The Act of April 7, 1874 (18 Stats., p. 27), provides that in cases coming by appeal from the Supreme Court of a Territory the findings of fact made by such Supreme Court instead of the evidence at large " shall be made and " certified by the Court below and transmitted to the " Supreme Court, *together with the transcript of the pro-* " *ceedings and judgment or decree.*"

In *Hecht* v. *Boughton*, 105 U. S. 235, 236, the Court held that—

" The facts set forth in the statement, *which must come* " *up with the appeal*, are conclusive upon us."

This rule was reaffirmed in

Idaho & Oregon Land Co. v. *Bradbury*, 132 U. S. 509, 513.

Marshall v. *Burtis*, 172 U. S. 630, 635.

And by the most liberal practice the power to enter findings after judgment or decree ceases when an appeal is taken.

North v. *Peters*, 138 U. S. 271, 283.

After appeal this Court has exclusive jurisdiction over the cause.

In re Chetwood, 165 U. S. 443, 456.

The statute of Arizona limits the period for findings or statement of facts in the Trial Court " not exceeding thirty " days after the adjournment of the term."

In *Cohn* v. *Daley*, 174 U. S. 539, 543, the Court ruled such statement or finding filed long after the entry of judgment was not the "statement," &c., required under the Act of April 7, 1874, *supra*, nor could it be regarded as part of the Bill of Exceptions under the Arizona Statute, nor considered as part of the record here. This ruling

has direct application in present case. The motion admits that there are neither findings nor statement of fact made by the Trial Court and accepted by the Supreme Court of the Territory, nor any statement or findings made by the latter Court accompanying the transcript on appeal. It is hence apparent that this Court can do nothing but affirm the judgment.

Marshall v. *Burtis, supra.*
Cohn v. *Daley, supra.*

And we so ask.

II.

The suggestion of diminution is hence erroneous. There *is* no part of the record which could properly come up with the appeal missing from the transcript to which such writ can run. The appellants ask that matter originating *since* the appeal and docketing of the cause in this Court (and manifestly not in existence or before the Court below prior thereto) be now brought up under writ of *certiorari*. We submit the writ cannot be so used.

III.

Even the findings or statement of facts which the Supreme Court of the Territory has, on November 2, 1899, essayed to make and file is challenged by the appellants. They distinctly ask that the writ now prayed may cover and call for return *inter alia* of "the objections "of the appellants to said statement of facts; also the "statement of facts and bill of exceptions tendered by the "appellants," and presented below long subsequent to the docketing of the cause here. This foreshadows plain purpose to seek in *this* Court review of the testimony and

the statement of facts sought to be made at recent date in the Supreme Court of the Territory. This the plain language of the Act of April 7, 1874, and its settled construction shown by the authorities *supra* wholly forbids. As cumulative authority we add:

San Pedro, &c., Co. v. *U. S.*, 146 U. S. 120, 130.

Haws v. *Victoria Copper Mining Co.*, 160 U. S. 303, 312.

We submit the motion for *certiorari* should be denied. And, upon its plain admissions, the record herein presenting nothing which can be here reviewed, the judgment below should be now affirmed.

Respectfully submitted.

ALDIS B. BROWNE,
ALEX. BRITTON,
Attorneys for Appellee.

No. 138.
Brf. of Browne & Britton for
Supreme Court of the United States.
October Term, 1899.
Filed Feb. 26, 1900.

SUPREME COURT, U. S.
FILED
FEB 26 1900
JAMES H. McKENNEY,
Clerk.

R. E. DAGGS AND A. J. DAGGS,
APPELLANTS,
vs.
THE PHŒNIX NATIONAL BANK.

No. 138.

BRIEF FOR APPELLEE.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Attys. for Appellee.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

R. E. DAGGS AND A. J. DAGGS,
APPELLANTS,
v.
THE PHŒNIX NATIONAL BANK.

No. 138.

BRIEF FOR APPELLEE.

STATEMENT.

This record presents three consolidated causes, brought by appellee to foreclose certain mortgages given by appellants to secure an indebtedness to it from appellants. The appeal properly brings up only for review the judgment of the Supreme Court of Arizona, affirming the judgment of foreclosure entered in the trial Court.

The original transcript, when filed herein, disclosed entire absence of any certified statement of facts, required by Sec. 2, Act of April 7, 1874 (18 Stats. 27), which reads:

"Provided, that on appeal, instead of the evidence "at large, a statement of the facts of the case, in "the nature of a special verdict, and also the rulings of "the court on the admission or rejection of evidence

" when excepted to, shall be made and certified by the " court below, and transmitted to the Supreme Court, to- " gether with the transcript of the proceedings and judg- " ment or decree. * * *"

Wherefore, appellants, at an early date in this term, moved and obtained writ of certiorari to cover this vital defect. Thereon the Supreme Court of Arizona has certified (Rec. 158) statement of facts in the nature of a special verdict, wherein is set forth (1) the controlling Practice Act of Arizona; (2) the judgment of foreclosure and sale entered in the trial Court, and (3) assignments of error made by present appellants in the Supreme Court of the Territory. Thereon that Court further certified as follows:

" Under the assignments of error thus made and pre- " sented in the record, this Court could and did make no " determination of the facts of the case, except such as " appeared in the pleadings and judgment, for the reason " that such of the assignments as were sufficient in form " to raise any question, presented none for our considera- " tion which necessitated the further finding of facts in " the case. We are unable to determine from the record " presented in this Court, in the absence of a bill of " exceptions and a statement of facts, what the facts were " which were put in evidence on the trial in the Court " below, further than as they are shown by the transcript " of the reporter's notes; and from such review of the " record the judgment of the District Court was affirmed " as follows:"

The Practice Act thus fully set out in such return provides in Section 4 (*inter alia*):

" The brief of the plaintiff in error or appellant shall " also next contain a distinct enumeration in the form of " propositions of the several errors relied on, and all errors

" not assigned in the printed brief shall be deemed to " have been waived."

Section 5 provides :

"All rulings made by the Court below in opposition to " the plaintiff in error or appellant shall be taken as ex- " cepted to by the party appealing or suing out the writ of " error, and when assigned as error in the brief shall be " reviewed by the Supreme Court without any bill of ex- " ception or other assignment of errors except as herein " provided."

Based upon such positive statute, the opinion of the Supreme Court of Arizona in this cause (Rec. 137), after statement of the pleadings and judgment entered thereon below, observes :

" At the outset we are compelled to call attention to the " omission of counsel to comply with the statute and the " rules of this Court on the subject of assignments of " error.

" These are imperative and must be observed. It is " not our business to search the record if perchance we " may find reversible error. It is our duty to examine " into such alleged errors, and only such as are dis- " tinctly pointed out in the record. The assignments " made by plaintiffs in error in their brief are, for the " most part, so general in character, and so wanting in " definiteness, that they cannot be considered. Although " defective as assignments, we have by liberal construction " found that two of them present questions for our re- " view. The first of these reads as follows :

" ' The Court erred in not giving judgment for plaintiffs " ' in error on their pleas in bar of the recovery of any " ' interest, for the reason that the contract with the " ' National Bank for ten per cent. interest is *ultra vires.*' "

Thereon that Court considered such assignment and upon clear reasoning and authority overruled same.

Having disposed of this point, its opinion (Rec. 140) proceeds:

"The second assignment of error as made by plaintiffs "in error reads:

"'The Court erred in overruling the plaintiffs' in error "'motion for judgment on the pleadings, for the reason "'that there was no reply to plaintiffs' in error verified "'counter claims.'

"The latter part of this assignment would appear to "indicate that what is intended is that the Court erred "in not rendering judgment for the plaintiff in error for "the amounts of the counter claims plead, because they "were not denied under oath by the defendant in error "in its reply to the amended answer filed by plaintiffs in "error."

This assignment of error is then considered at length by the Court and also overruled.

This constitutes ALL of the case found reviewable in the record as presented to the Supreme Court of the Territory.

Dissatisfied with the certified statement of facts made by the Supreme Court of the Territory and certified by it under the writ of certiorari heretofore issued, appellants recently petitioned this Court for leave to file petition for writ of mandamus against the Justices of the Supreme Court of Arizona to compel them to search the entire record and certify complete statement of facts thereon, as in assumed compliance with the Act of 1874. The Court denied the petition.

Notwithstanding all of this, counsel for appellants now file in this Court an elaborate brief, containing twenty-one separate assignments of error, going far beyond anything heard and determined in the Supreme Court of the Territory, and calling to his aid in the argument of such

numerous assignments the entire record of the cause. The plain assumption involved in such procedure is that *this Court* will thereon search the entire record in consideration of all the numerous errors now assigned, and thereby grant appellants a review of the entire cause with as full effect as if this tribunal of last resort was the Court of first instance, sitting to hear all of the evidence and to determine all of the controversy as it may have been originally presented.

Counsel for appellee must properly decline to enter upon any such enlarged field of discussion. From our understanding of this Court's repeated and fixed construction of the Act of 1874, with respect to limitation of review upon appeal to the facts as found and certified by the Court below, it would only be additional trespass upon the time and patience of the Court if we should follow the wide excursions of counsel from that part of the record which is properly open to review here and the questions of law thereon, which the Supreme Court of the Territory judicially certified as alone open to its review under the law and practice, by reason of appellants' method of presentation of their cause to that Court. It does not need the suggestion from us that having thus limited review in the Court below, appellants cannot now widen the field of argument and decision here to embrace the entire case as fully as if it were now being heard in the Court of first instance.

If it were proper for appellants to thus open the entire record precisely as if the cause were on original hearing, it would be equally proper for us to suggest as the actual facts in the case, that:

1st. This is a controversy involving indebtedness of the entire Daggs family to this appellee. It originated, in the first instance, in the indebtedness of W. A. and P. P.

Daggs to the appellee bank, and also as responsible owners of the failed bank of Tempe, Arizona, whose overdrafts were held by this appellee bank. In settlement of this aggregate indebtedness the notes and mortgages forming basis of present suit were given by appellants, A. J. and R. E. Daggs. Default in payment with consequent proper effort on the part of appellee bank to foreclose the mortgages given as security therefor has produced this protracted litigation, in plain effort of the Daggs family to avoid their just indebtedness. (Rec. 127.)

2d. And in support of that effort to assert the charge of usury against the appellee bank and to invoke the most technical rules of pleading in sustaining their alleged counter-claim.

ARGUMENT.

I.

The Defense of Usury.

This defense is fully and well considered in the opinion of the Court below. The notes of appellants given the appellee bank and forming basis of this suit provide interest at ten per cent. per annum. Appellants contend that the appellee bank has hence violated Sections 5197 and 5198 of the United States Revised Statutes, because thereby inhibited from charging or receiving more than seven per cent., and hence under Section 5198 the appellee bank must suffer forfeiture and loss of *all* interest whatsoever, upon appellants' admitted obligations here in suit.

This question assumes an importance far beyond the amount involved in present case.

If national banks in that section of the country are

limited in fact and law to seven per cent., while private or territorial banks, and all individuals in Arizona may, by the express statutory law thereof, contract or agree for any rate of interest, then it is manifest that Congress has imposed upon national banks a limitation which places them at serious disadvantage in conducting a banking business therein, with resulting discrimination which is not, in our understanding, sustained either by the letter of the national banking act or any judicial construction thereof.

At the outset, and to avoid needless repetition, we invoke the Court's examination of the opinion of the Supreme Court of Arizona herein (Rec. 138–140) as disclosing that Court's full accord with existing State authorities, summarized in the concluding words of the opinion thus:

> " In accord with the Courts of the States of California, " Colorado, Texas, and North Dakota, we have reached " the conclusion that a national bank in Arizona is privi- " leged to charge and collect any rate of interest which " may be agreed upon, and is as free to act in this regard " as are banks organized under local laws, or as individ- " uals living in the Territory."

Inasmuch as the opinion below fully cites the decisions of the highest Courts of the States thus named, we do not extend this brief with unnecessary reference thereto. Our examination of these cases discloses that the point was directly in issue in each case, and was stated and considered with great fullness. In all of these cases (as here) the law of the State or Territory, by express enactment, gave unrestricted right of contract in respect to rate of interest.

Opposing counsel sweep all of these decisions aside upon the sole assumption that the decision of this Court,

in *National Bank* v. *Johnson* (104 U. S. 271), rules the contrary. We do not so understand that decision, nor is it so understood or applied by the State Courts in the cases ruled therein since its rendition.

In *Bank* v. *Johnson*, the recited facts show that the bank discounted for Johnson, commercial paper, charging and receiving interest therefor "beyond the rate allowed by the general laws of the State." And the contention on behalf of the bank was stated by Mr. Justice Matthews in the opinion thus:

"It is contended, on behalf of the plaintiff in error, "that the sections of the Revised Statutes in question "were intended only to prevent national banks from "violating the usury laws of the State in which they were "severally organized and established; and that while, by "the law of New York, it is usurious to loan or advance "money to a party upon his own paper, or upon paper "made for his accommodation, at a greater rate of interest "or discount than seven per cent. per annum, it is not "usurious or illegal in that State for natural persons to "acquire business paper, that is, paper valid in the hands "of the holder, so that he might maintain an action "thereon against the prior parties, at any rate of discount "agreed upon between the parties to the negotiation, "without limit in excess of seven per cent. per annum."

In ruling against the bank the Court of Appeals (74 New York 329) stated:

"In this State the rate of interest on money is limited "to seven per cent., and the Act of Congress consequently "limits the rate of discount to that rate."

It thus appears that the facts present a case within the express law of the State limiting all parties to a fixed rate. There being in New York (so far as our understanding and research extends) no express statutory provision, as

in Arizona and elsewhere, giving parties the right to contract for higher interest, and thereby making, in the fullest sense of Sec. 5197, U. S. Revised Statutes, the rate of interest "allowed" by law that which all persons within the State or Territory might, by express contract, agree upon.

With this wide difference between the law of New York and of the States whose interest laws are similar to that of Arizona, and in harmony with the decisions of whose Courts the Court below has ruled in this case, it is obvious the decisions of these various Courts, and of the Court below herein, may well stand without conflict, express or implied, with this Court's decision in *Bank* v. *Johnson*, *supra*.

Indeed the highest Courts of Colorado and North Dakota, in their cited decisions upon this subject, carefully and fully review the decision of this Court in *Bank* v. *Johnson* and reason therefrom no conflict with their own conclusions, based upon the statute law of their respective States.

Thus, in *Rockwell* v. *Farmers' National Bank of Longmont* (36 Pac. Rep. 905), the Court of Appeals of Colorado concludes its extended review of the decision in *Bank* v. *Johnson* with this pertinent and controlling observation:

"As demonstrated, the case under consideration did not
" come up from a State where there was no statute fixing
" a rate, nor from one where the law fixed one rate, but
" permitted any rate to be charged which might be agreed
" upon between the parties. It came from a State having
" one fixed rate of interest, which, of course, under the
" federal statute, would be conclusive upon the right of
" a national bank. In the next place, it was a statement
" *arguendo* and could only be held to refer to a case where
" the laws of the State were silent."

And continuing, the Court further said :

" The court has been cited to no case expressing a different opinion from that at which we have arrived, while " the cases referred to are in exact accord with our conclusions. Three of the cases present the case in a " somewhat different aspect from the one at bar, but are " very illustrative of this theory of construction. They " were actions upon notes reserving 10 and 12 per cent. " interest, where the general rate was 6, though the parties " by contract were authorized to charge at the rate of 10 " and 12 per centum per annum. It was conceded that 6 " was the general rate fixed by the statute, and that the " other was totally dependent upon the agreement of the " parties; yet the courts held that the national banks " might reserve and receive whatever interest was allowed " by the law of the State regulating the matter. Wiley *v.* " Starbuck, 44 Ind. 298; Newell *v.* Bank, 12 Bush. 57; " Crocker *v.* Bank, 1 Thomp. Nat. Bank Cas. 317, Fed. " Cas. No. 3397. It will be observed that in these cases " the rate was established by the law of the State, and " there was a limit put by the same laws, beyond which " neither individuals nor banks could go. Within the " limits, interest might be reserved. The courts in reaching their conclusion proceeded upon the hypothesis " that, under the national banking act, the bank might " charge any interest allowed by the laws of the State in " which it was organized, even though the rate above 6 " must be the subject of convention, and, unless the limit " were reached, the rate as a rate would not be stated. " This was regarded of no moment in the interpretation " of the statute. It is very plain that if the bank had " reserved 9 per cent., while the respective limits were 6 " and 10, an amount would have been charged in a case " where there was no definite legislation directly authorizing " either the individual or the bank to charge 9 per cent., " other than that flowing from the legislation which made " the matter of interest between the two definite limits a " subject of convention. This distinction does not seem " of very much consequence in the solution of the inquiry.

" If it be true that, in a State where interest may be the " subject of an agreement, the bank may reserve whatever " the parties agree upon up to a maximum, then all " statutes reserving the right of agreement to parties, " whether they name a maximum or not, must be equally " effectual for the purposes of a grant of power.

" The definite question under consideration has been " expressly settled against the appellant in three different " states. Bank *v.* Bruhn, 64 Tex. 571; Hinds *v.* Mar- " molego, 60 Cal. 229; Bank *v.* Stover, *Id.*, 387; Guild *v.* " Bank (S. D.) 57 N.W. 499. These courts conclude that " national banks may charge as high a rate of interest as " is allowed to either individuals or banks of issue in the " various states of their organization. In all states where " there is a statute fixing a rate of interest the only limi- " tation upon this right must be found in the statute it- " self. The restriction contained in the national banking " act which forbade national banks to charge more than " 7 per cent. only, became operative in the absence of " state legislation on the subject. Wherever the state " legislature has acted, the general grant of power to " banks to charge whatever rate might be reserved " either by citizens or banks of issue became operative. " Under this construction, banks in Colorado are placed " on precisely the same footing as individuals. The " legislative act on the subject fixed a rate, to wit, 8 per " cent., and further provided another rate of interest, " which is determined by the agreement of the parties. " That the legislature has failed to say the rate shall not " exceed 12 per cent. per annum, or 5 per cent. per " month, does not destroy the legal effect of the enact- " ment, nor restrict its operations to other banks or " citizens generally, nor make the case one where no rate " of interest is named, whereby the federal limitation " becomes operative. In common with these other " courts which have reached a similar conclusion, we " hold that national banks in Colorado stand on the same " footing in the matter of interest that other banks and " individuals occupy. The defense was unavailable. The " demurrer was properly sustained, and the judgment " will be affirmed."

In *Guild* v. *First National Bank of Deadwood* (57 N. W. Rep. 499) the Supreme Court of South Dakota, in affirming the same rule of equality on part of national banks, pertinently observes (p. 502):

"The authority mainly relied on by counsel for respondent in support of this contention, is the case of *Johnson* v. *Bank* (74 New York, 329), and the same case was taken by writ of error to the Supreme Court of the United States, and reported under the title of *Bank* v. *Johnson* (104 U. S. 271). We have given these two decisions very careful consideration, but we are unable to discover their applicability to the case at bar. It seems to us that the question presented in that case for decision was an entirely different one from the one presented in the case at bar. The highest rate of interest established by law in New York was seven per centum per annum. And no provision was made by law for taking any higher rate by agreement of parties or otherwise. The interest was absolutely fixed and limited by law to a rate not exceeding seven per cent. The National bank, in that suit, took and received interest at the rate of twelve per cent., but claimed it was taken not as interest, but as discount in the purchase of business paper. The Court of Appeals in New York and the Supreme Court of the United States held that, under the National Banking Act, discounting paper was one of its forms of loaning money, and the rate of such loans being limited by the laws of the State of New York, the bank could not take interest in excess of that limit."

These decisions of the State courts, and in the case at bar, stand in entire harmony with the spirit and purpose of the National Banking Act in this regard, as well stated by this Court in *Tiffany* v. *National Bank of Missiouri* (18 Wall. 409).

In that case the law of Missouri limited State banks of

issue to eight per cent. interest charge, but permitted individuals to receive ten per cent. Thereon this Court ruled:

"The position of the plaintiff is, that the general provision of the Act of Congress that National banking associations may charge and receive interest at the rate allowed by the laws of the State where they are located, has no application to the case of these defendants, and that they are restricted to the rate allowed to banks of issue of the State, that is, to 8 per cent. This, we think, cannot be maintained. The Act of Congress is an enabling statute, not a restraining one, except so far as it fixes a maximum rate in all cases where State banks of issue are not allowed a greater. There are three provisions in section thirty, each of them enabling. If no rate of interest is defined by State laws 7 per cent. is allowed to be charged. If there is a rate of interest fixed by State laws for lenders generally, the banks are allowed to charge that rate but no more; except that if State banks of issue are allowed to reserve more, the same privilege is allowed to National banking associations. Such, we think, is the fair construction of the Act of Congress, entirely consistent with its words and with its spirit. It speaks of allowances to National banks and limitations upon State banks, but it does not declare that the rate limited to State banks shall be the maximum rate allowed to National banks. There can be no question that if the banks of issue of Missouri were allowed to demand interest at a higher rate than ten per cent. National banks might do likewise. And this would be for the reason that they would then come within the exception made by the statute, that is, the exception from the operation of the restrictive words 'no more' than the general rate of interest allowed by law. But if it was intended they should in no case charge a higher rate of interest than State banks of issue, even though the general rule was greater, if the intention was to restrict rather than to enable, the obvious mode of expressing such an intention was to add the words 'and

" 'no more,' as they were added to the preceding clause
" of the section. The absence of those words, or words
" equivalent, is significant. Coupled with the general
" spirit of the act, and of all the legislation respecting
" National banks, it is controlling. It cannot be doubted,
" in view of the purpose of Congress in providing for the
" organization of National banking associations, that it
" was intended to give them a firm footing in the different
" States where they might be located. It was expected
" they would come into competition with State banks,
" and it was intended to give them at least equal advan-
" tages in such competition. In order to accomplish this
" they were empowered to reserve interest at the same
" rates, whatever those rates might be, which were al-
" lowed to similar State institutions. This was consid-
" ered indispensable to protect them against possible un-
" friendly State legislation. Obviously, if State statutes
" should allow to their banks of issue a rate of interest
" greater than the ordinary rate allowed to natural per-
" sons, National banking associations could not compete
" with them, unless allowed the same. On the other hand,
" if such associations were restricted to the rates allowed
" by the statutes of the State to banks which might be
" authorized by the State laws, unfriendly legislation might
" make their existence in the State impossible. A rate of
" interest might be prescribed so low that banking could
" not be carried on except at a certain loss. The only
" mode of guarding against such contingencies was that
" which, we think, Congress adopted. It was to allow
" to National associations the rate allowed by the State
" to natural persons generally, and a higher rate, if
" State banks of issue were authorized to charge a higher
" rate. This construction accords with the purpose of
" Congress and carries it out. It accords with the spirit
" of all the legislation of Congress. National banks have
" been National favorites. They were established for the
" purpose, in part, of providing a currency for the whole
" country, and in part to create a market for the loans of
" the General Government. It could not have been in-
" tended, therefore, to expose them to the hazard of un-

" friendly legislation by the States, or to ruinous compe-
" tition with State banks. On the contrary, much has
" been done to insure their taking the place of State banks.
" The latter have been substantially taxed out of exist-
" ence. A duty has been imposed upon their issues so
" large as to manifest a purpose to compel a withdrawal
" of all such issues from circulation. In harmony with
" this policy is the construction we think should be given
" to the thirtieth section of the act of Congress we have
" been considering. It gives advantages to National banks
" over their State competitors. It allows such banks to
" charge such interest as State banks may charge, and
" more, if by the laws of the State more may be charged
" by natural persons."

It must be further remembered and in entire harmony with the spirit of foregoing decision, that the National Banking Act operates throughout the whole United States. In the older States an increasing security affects the loaning power of money in far greater degree than in the extreme West, where, with more limited capital and greater hazard, these two elements, which lie at the foundation of interest charge, justify much higher rates. Hence in those States and Territories where, by express law, the right of individual contract in respect to rate of interest is expressly established, there should be such application of the National Banking Act as will give parties doing business thereunder equal advantage with respect to their neighbors, whether private banks or individuals, in competition for the transaction of the banking business. Such is the true and clear intendment of the National Banking Act as expounded by this Court in the case just cited, *supra*, at length. Under such conditions, and to permit National banks to do business, it should not be ruled that because in a case arising under the laws of New York, where there is no express statutory power to charge or receive a rate

of interest in excess of a named per centum, the rule of construction announced in *Bank* v. *Johnson* must likewise control in those States and Territories where express authority to covenant for higher rate of interest *is* given by the written law. The National Banking Act affords to the entire country a method of safe banking under Federal control, which is as essential in one part of the Union as in another. But to force a construction from the National Banking Act which would, under the circumstances here disclosed, bar a national bank in Arizona from doing business on equal footing with other banks or individual lenders of money, would be to create an unnecessary bar and greatly cripple their operations. Higher rates of interest obtain when through scarcity of money and resulting inconvenience in parting therefrom by the lender is combined the increased hazard in respect to the security furnished therefor. These are general conditions throughout much of the Western territory. They have been of long continuance, and were well known to Congress when the National Banking Act was passed. It does not comport with sound reasoning to suggest that Congress advisedly created corporations with banking functions and sent them out to compete in their business with such restrictions upon the earning power of their capital as to put them at constant disadvantage with State banks or individuals who are left wholly unfettered in this regard.

In commenting upon these provisions of the National Banking Act, this Court, in *Farmers' National Bank* v. *Deering* (91 U. S. 29), pertinently said (p. 35):

"There was reason why the rate of interest should be "governed by the law of the State where the bank is "situated."

But we submit there can be no just reason to affirm the

rule here urged against us, whereby *part* only of the law of Arizona, with respect to interest, would be so applied, and national banks therein thus put on inequality with all other banks or individuals. Or, to state the case in most pointed form, where, under the laws of Arizona (Sec. 2162 R. S. Ariz.), "parties may agree in writing for "the payment of any rate of interest whatever on money "due or to become due under any contract," etc., and the parties in present cause *have* so agreed, it is plain that the rate of interest thus fixed is fully "allowed" by the law of the Territory within the full meaning of Section 5197, U. S. Rev. Stats. The broad, clear, purpose of that section is to prohibit national banks from violating the interest laws of the State or Territory in which they are doing business. As such banks are wholly under federal control, and could not be reached by State law in this regard, the limitation as found in the Revised Statutes ought not to be so applied as to make unlawful thereunder what is by local statute perfectly lawful between the lender and the borrower.

Otherwise stated, there is no possible ground for appellants' claim that under the laws of Arizona the agreement to pay ten per cent. was usurious or forbidden. On the contrary, it was directly authorized. When the local law thus "allowed" the rate of interest here agreed on, it is, we submit, a strained and unreasonable construction of Section 5197 to insist that by the terms of that section alone, the taking of interest at a rate perfectly lawful under the laws of Arizona, with respect to all other parties, has thereby become unlawful with respect to this national bank. On the contrary, whatever is lawful by way of interest charge under the local law was intended by the banking act to be extended to the banks created thereunder, and such, we take it, was the clear meaning of this

Court in *Bank* v. *Deering*, *supra*, when it distinctly affirmed that "the rate of interest should be governed by "the law of the State where the bank is situated."

II.

Appellants' Alleged Counter-Claim.

All of appellants' extended argument on this head reaches the sole contention, in legal effect, that they are entitled to judgment upon their counter-claims, so called, because the appellee bank, as defendant, did not, in its plea of denial thereof, verify same by oath.

Responsive to the whole of that contention, as made in the Supreme Court of Arizona, the opinion of that Court (Rec. 141) rules:

"The general denial made by the defendant in error by "way of reply to the counter-claims set up in the answers "of the plaintiffs in error was sufficient, although not "verified, to put the plaintiffs in error upon proof except "as to any matter pleaded therein which by paragraph "735, Revised Statutes, is required to be denied under "oath. An examination of the matters pleaded by way "of counter-claim in the answers of plaintiffs in error "discloses that none of those are matters which are "required to be verified by said paragraph, except the "allegation contained in the first counter-claim attempted "to be set up, founded upon the assignment of the note "by P. P. and W. A. Daggs to A. J. Daggs. It is alleged "that the note was assigned by the bank to Daggs by an "instrument in writing. As to this allegation, possibly "under subdivision five of said paragraph 735, under the "general denial unverified by the oath of the defendant "in error, the assignment should properly be taken as "admitted. To warrant a recovery, however, something "more than the proof of the assignment of the note to

" Daggs was needed. While our statutes recognize the " right of an assignee to hold the indorser of a non- " negotiable chose in action as surety for the payment of " the same, no recovery is authorized without it be shown " that the assignee had used due diligence to collect the " same. Par. 123, 124, R. S.

" Again, an examination of this pleading shows that it " fails to state a cause of action. A counter-claim must, " to be good, contain every allegation which would be " needed in a complaint founded on the same cause of " action. The only allegations which are made in this " counter-claim are that the bank assigned a non-negoti- " able promissory note, past due, to A. J. Daggs, and " that at the time of the assignment the makers were " insolvent and were still insolvent, and that the same " had not been paid. No allegation is made that due " diligence was used, as required by the statute, or that " any effort was made to collect the same. This omission " in the pleadings is doubly fatal, for the reason that the " note appears, from an indorsement upon its face, to " have been secured by chattel mortgage of even date " therewith. With this endorsement thereon, the mere " allegation of the insolvency of the makers of the note " was not sufficient to charge the endorser as a surety " without an allegation of the exercise of due diligence " to collect the same and to enforce the security, and a " failure, after such effort, to collect the same. The " motion for judgment upon this counter-claim was not " only properly denied by the court below, but had no " reply been filed by the defendant in error the facts " pleaded were not sufficient to support a judgment " thereon. The judgment of the lower court is affirmed."

In thus ruling the Court assumes that there may have been liability on part of appellee bank to these appellants on their failure to collect the note made the basis of the counter-claim. But neither in its opinion nor certified statement of facts is there any finding or suggestion that upon the facts the appellee bank was so liable as endorser

or transferrer of this chose in action. The appellants did so plead such liability, but the appellee bank as distinctly denied it. The opposing counsel admit that the question of *fact* was tried in the Court of first instance; the foreclosure judgment, which is part of the certified statement of facts from the Supreme Court of the Territory (Rec. 160), distinctly recites that testimony was presented and considered by the Court from both sides, and "upon the pleadings and proceedings" in the three causes which were tried there and consolidated by stipulation, judgment of foreclosure, as prayed by the bank, was duly entered.

In the absence of any findings of fact as resulting from the testimony thus introduced, we submit, with confidence, that this Court cannot now conclude that issue was not fully joined; testimony taken; and judgment thereon fully rendered by the trial Court with respect to the merits of appellants' counter-claim and the defense of the appellee bank thereto.

The same conclusion must obtain with respect to the other and distinct grounds of appellants' alleged counter-claim arising from the asserted failure of the appellee bank to permit the use of its name on appeal to this Court, in the litigation involving the note made the basis of such counter-claim. In other words, in the present state of the record, it must be justly assumed that on this alleged claim the trial Court was fully apprised by the evidence, and rendered its judgment in the light thereof. *Unless* this Court shall go outside the certified statement of facts and examine this entire transcript, we submit the foreclosure judgment, by its recitals, must conclude further inquiry here. As suggested at the outset, appellants' counsel has assumed that the appeal to this Court has opened the entire transcript of record, including all testimony, and set at large all questions which were heard and

determined in the first instance by the trial Court, but which were not reviewed on appeal by the Supreme Court of the Territory. To argue the case in this fashion is indeed anomalous. Appellants have wholly failed to comply with the Practice Act of Arizona; that failure has restricted the highest Court of the Territory to a review of only two questions as set forth at length in its opinion, and as certified to this Court in response to the writ of certiorari. Yet, having thus presented and argued their case in the Supreme Court of the Territory, appellants now seek to open wide the entire record in this Court, and argue the case upon the theory that your Honors will ignore the statement of facts certified by the Supreme Court of Arizona; ignore also the plain limitations upon the powers of review of this cause imposed upon that Court by appellants' own course of action, and will here search the entire record and listen to all assignments of error as fully and completely as if the appeal had brought up the entire transcript, without necessity, by statute or otherwise, for certified findings. As suggested at the outset, we cannot follow counsel in any such wide excursion, based upon such impossible premises. Our sense of propriety must plainly forbid.

The opinion of the Court below, quoted at length *supra*, on this head, distinctly rules that under the Practice Act of Arizona, the counter-claim was fatally defective as plead and required no answer from the appellee bank, because not stating facts sufficient to support an independent judgment against it.

With all respect, we submit that the construction thus given the Practice Act of Arizona by the Supreme Court of the Territory, is entitled to that conclusive consideration which is given to the construction of State laws and State practice by the highest Courts of the State when causes are brought in review therefrom to this Court.

Set-off and counter-claims are matters wholly unknown to the common law or the common-law system of pleading. They are creations of statute, and such statutes are as different as the different views of the separate legislatures of the States and Territories have deemed it proper to prescribe.

If we were here dealing with matter of common law, the application thereof to this case by the Court below would undoubtedly be open to the fullest consideration in this Court, and to reversal on error, but we fail to understand why the interpretation given by the Court below to the Practice Act of Arizona in dealing with these Statutory claims or defenses created thereby should not be accorded here as full and conclusive effect as if the Court were now sitting in review of a cause embracing like questions coming from the highest Court of a State. There is no suggestion that the Supreme Court of Arizona has here applied any rule of construction of its own Practice Act, different from any prior adjudication or ruling of that Court. Under such circumstances, we submit that the highest Court of Arizona should be treated with all the respect which is accorded to the highest Court of the States in the interpretation of local statutory law. Certainly the rule may well be invoked to this effect in respect to matters of pure pleading and practice.

And finally, on this head, it may be justly observed that *if* the ruling of the Court below on this point is subject to proper review here, then it must be remembered that the judgment of the trial Court, as appears in this record, was *not* based upon the pleadings alone, but upon the testimony and entire proceedings in the cause. *If* the denial of the appellee bank to the alleged counter-claims of the appellants was not under oath when it should have been, the parties went to trial in that state of the plead-

ings, the Court heard all the testimony offered on both sides, and it should hence be conclusive here to suggest that under such circumstances, and with no findings of fact directed to this point, the trial Court did enter judgment of foreclosure, and hence necessarily found appellants' counter-claims not supported by the evidence submitted thereon.

In thus acting the Court was in accord with the general practice. In *Randolph* v. *Mayor, etc., of New York* (53 How. Pr. N. Y. 68) it was held that a defendant waives the advantages derived from the failure of the plaintiff to reply, if he goes into proof of the counter-claim and by such proof shows that it could not properly have been set-off against the plaintiff's demand.

In *Am. & Eng. Ency. of Law* Vol. 22, Title "Set-Off," pp. 429-430, the general rule is clearly stated thus:

"By a failure to support a counter-claim by proof, "however, the defendant loses the benefit of an admission "by failure to reply, and the objection that the facts set "up as a counter-claim do not constitute a cause of action, "or that the cause of action thus set up is one of which "the Court has no jurisdiction, is not waived by a failure "to reply."

We hence submit that the Supreme Court below ruled correctly (1) both in holding the appellee bank's reply to the appellants' counter-claims sufficient in form, and (2) in further holding that, under the counter-claim as stated, no reply was necessary.

III.

Appellee Bank not Liable as Assignor.

Opposing counsel assumes such liability, and from that premise argues at length in avoidance of the obligation of

due diligence on part of the appellants against the makers of the note made the basis of their counter-claim. If the Court shall consider this counter-claim in any view, it is essential to so consider it in connection with the written assignment (Rec. 27) under which alone this note was transferred. The separate pleadings of appellants (Rec. 21–24) set out this non-negotiable note as payable to Thomas Armstrong, Jr., and by him alone endorsed. Manifestly, if taken by appellants from appellee bank in that form it would alone have (1) neither conveyed title, nor (2) imposed liability on part of the bank as endorser or otherwise. It is hence impossible to consider the matter of this counter-claim in this regard (which is by no means conceded to be open to consideration here on present record) without bringing into view and full consideration the assignment and transfer of this note and its accompanying securities. (Rec. 27.)

Analysis of that contract or agreement shows that, in stated consideration of the notes given by appellants and accompanying mortgages, the appellee bank "have sold, "assigned, transferred and set over unto the said A. J. "Daggs all their right, title, and interest in and to a "certain promissory note signed by W. A. Daggs and P. "P. Daggs, as partners, doing business under the firm "name and style of W. A. & P. P. Daggs, and W. A. & "P. P. Daggs, individually, for five thousand dollars "($5,000.00)," secured by a stated mortgage upon certain sheep.

By this assignment the appellee bank clearly transferred, by quit-claim, all its "right, title and interest" in the note described WITHOUT any guaranty whatever in respect to payment thereof. As non-negotiable paper it was, in legal effect, simply a chose in action. Had it been a negotiable note, the rule under the law merchant would have been the same.

Thus, in *Lyons* v. *Divelbis* (22 Pa. St. 185), a negotiable note was assigned thus:

"I assign the above note to Johnson Divelbis."

And on suit by the latter against the assignor (Lyons) the Court well ruled:

"Every endorsement of a promissory note includes in "it an assignment, but an assignment is not necessarily "an endorsement. The Statute of 3 and 4 Anne, Chap. "IX, distinguishes between the two methods of transfer, "when it authorizes the holder, whether by *endorsement* "*or assignment*, to bring an action in his own name "against the *maker* or *endorser*. No action is given by "the statute against the assignor. An endorsement is an "authority to the holder to write over the signature an "order upon the maker in the nature of a bill of exchange. "It is a commercial transaction, and the law merchant "fixes the measure of liability as in bills of exchange. "An assignment of a chose in action is in strictness un-"known to the common law. It is, however, recognized "in equity, and transfers to the holder the rights of an "assignor, at a price presumed to be no more than equal "to the value of the claim against the maker, taking into "consideration his character for punctuality, and his "ability to pay. On such a transfer the assignor is re-"sponsible for nothing but the genuineness of the claim. "The instrument on which this action was brought is a "transfer, of the description last mentioned, written upon "a note overdue at the time. On this there is no resort "for indemnity against the insolvency of the debtor."

In *Am. and Eng. Ency. of Law*, 2d Ed., Title "Assignments," p. 1091, it is said:

"In some jurisdictions it is held that the assignment of "a chose in action, such as a bond or judgment, does not "imply a warranty that it will be paid, and the assignor

" will not be liable to the assignee on default of the " debtor, unless he has rendered himself liable by an ex- " press contract, or has been guilty of fraud."

A large number of cases are cited in the foot-note supporting this statement of the text.

The text adds:

" In other jurisdictions, however, it is held that the " assignor of a non-negotiable obligation for the payment " of money will be liable to the assignee, in case the latter " is unable to recover from the obligor, after the exercise " of due diligence, at least to the extent of the considera- " tion paid for the assignment. But the assignee cannot " proceed against the assignor until he has exercised due " diligence in an unsuccessful attempt to recover from the " obligor."

And in the foot-note a few decisions, sustaining this doctrine, rendered in Kentucky, Virginia, and West Virginia are cited.

We submit the rule which relieves the assignor from such obligation on non-negotiable paper " unless he has " rendered himself liable by an express contract, or has " been guilty of fraud," is sound and preferable.

The two cases last cited, *supra*, sustain the latter doctrine, and among the numerous additional authorities given in the note in support thereof, we cite, as illustrative, *Stout* v. *Stevenson* (4 N. J. Law Rep. 178), which involved an action against the assignor on a bond reading thus:

" I do sign all my right and title, interest and claim of " this within note to William Stevenson, and guarantee " the payment thereof."

Thereon the Court observed:

"A simple assignment, therefore, subjects the assignor " to no other responsibility than the simple sale of any

" other property, but if to the assignment he adds a war-
" ranty, or, as it is here expressed, guarantees the pay-
" ment in general terms, that warranty or guarantee is
" absolute and co-extensive with the instrument itself."

So in *Kirkpatrick* v. *McCollough* (3 Humph. 171), it was held that the endorser of paper not negotiable is only responsible when he specially contracts to be so, or where he transfers the paper fraudulently; and in the latter case not upon the endorsement but by special action for the consideration paid by the endorsee.

Referring again to the written assignment here involved (Rec. 27), it will be further noted how fully and justly this rule should here apply. Therein, after the words " have sold, assigned, transferred, and set over unto the " said A. J. Daggs all their right, title, and interest" in and to the promissory note in question, the instrument proceeds to state that the note is in litigation between the appellee bank and named parties, to determine priority of certain mortgages, and such cause of action and rights of the appellee bank therein are by the instrument " also " hereby sold, assigned, transferred, and set over" unto A. J. Daggs, &c.

Upon the face of this agreement it is therefore clear that appellants took this non-negotiable note, the mortgages given as security therefor, and the right of action then pending by the *same* instrument, under the *same* assignment, as one transaction, and necessarily thus took the right, title, and interest only of the appellee bank therein. In other words, these appellants bought a lawsuit; taking therewith overdue paper, and assuming all chances in payment or the results of the litigation respecting the property given as security therefor. In such an instrument, therefore, the absence of any form of guarantee by the appellee bank is significant and convincing that all

the bank intended to do and did do was to transfer whatever interest it had in this overdue paper and underlying security.

Manifestly, the implied warranty was of its title to the note and its right to receive payment thereon from the makers thereof, but the warranty did not imply anything beyond in respect to payment, or the absolute priority of the security transferred with the note by the same instrument. In this situation it is impossible to conclude that the bank, in fact or law, assumed an obligation to make good to these appellants their failure to recover the amount of the note, either from the makers thereof or the property pledged under the mortgage given to secure its payment. Much is made in argument of the averments in the appellants' counter-claim that when this assignment was made by the appellee bank to these appellants, the makers of the note (W. A. Daggs and P. P. Daggs) were actually and notoriously insolvent, and extended argument is submitted to show that under such circumstances no diligence was required from appellants in seeking primary recovery from them. We fail to apprehend the relevancy of such argument. The paper was overdue. The insolvency of the makers must have been as well known to their two brothers (these appellants) as to the bank. They were seeking to make a settlement with the bank whereby this obligation of W. A. and P. P. Daggs to the bank could be *extinguished* as against the bank by this renewed indebtedness, and the mortgages given thereunder, which are the subject-matter of these foreclosure suits. *If* it is possible to hold the assignor of non-negotiable paper or chose in action responsible in any case, the rule can certainly have no application in case at bar, under the plain facts, and the plain inference to be justly drawn therefrom. Excluded from the consideration of the tes-

timony by every proper rule of procedure here, it must be well inferred that the trial Court committed no error of fact or law in passing upon this counter-claim.

IV.

Alleged Failure of Bank to Continue Litigation.

Reply to appellants' extended argument on this point can be briefly made. The contract or agreement (Rec. 27) above described concludes with this provision with respect to the action then pending to enforce the mortgage given to secure the Daggs' note:

"It is further agreed that the aforesaid cause of action "described shall be continued in the name of the Phœnix "National Bank until the case is determined and settled, "but it is further agreed that from this date, November "1, 1894, A. J. Daggs shall pay the costs that shall here- "after accrue in the said cause."

In the alleged counter-claim as plead, these appellants lustily declare that the appellee bank committed breach of its agreement on this head by refusing to sign cost bond on appeal to the Supreme Court of the United States, *long after* this agreement was made. There is no suggestion in such pleading or counter-claim that the bank was tendered indemnity, by way of bond or otherwise, against the costs and damage which it would have primarily assumed on such appeal to this Court, *if* it had signed the bond so tendered. Admitting its refusal to sign such bond, under advice of counsel, we submit such advice was wisely given, and that the bank acted within its clear, legal right. The giving of the cost bond by the bank was not necessary, for in *Brockett et al.* v. *Brockett* (2 How. 238), it was long since ruled that—

" It is sufficient if the appeal bond is approved by the " Court, as satisfactory and complete security, by whom- " soever it may be executed."

But if the bank was a necessary party, as principal obligor on such appeal bond, then, under the very terms of its agreement with these appellants, the bank could not be asked nor called upon to execute such an obligation, without being tendered full security or indemnity therefor. There is no averment in all the pleadings of these appellants that they tendered such security or indemnity at any time or in any form.

V.

R. E. Daggs' Claim of Suretyship.

This merits only brief attention. He is nowhere so described in this record until he appeared with his answer on the morning of the day of trial. Summons issued on these foreclosure suits on February 21, 1896 (Rec. 6). The separate answer of R. E. Daggs is noted as sworn to October 12, 1896 (Rec. 10). The judgment in the trial Court recites that trial was had on the same day (Rec. 73).

The law of Arizona, under which Daggs claims the right as surety to have his suretyship first tried, distinctly provides that it shall not thereby delay the plaintiff's trial. The original answer of both these appellants (Rec. 7) discloses no suggestion from R. E. Daggs that he then claimed the position of surety. *Contra*, he joined with his co-defendant by such original answer (1) in excepting to the sufficiency of the complaint, and (2) as further answer, " denies each and every allegation therein contained, " *except the execution of the instrument sued on.*" That answer remained of record, unchanged and unamended, until the very day of the trial, when, for the first time, R.

E. Daggs sought to plead as surety only. His original mortgage to the bank (Rec. 3) recites the consideration of one dollar, and as security for the three promissory notes of A. J. Daggs therein described, "and for other and "further valuable considerations 'to me in hand paid "by the Phœnix National Bank," etc.

The record thus estops his claim of suretyship by the recitals of his own mortgage and his original plea. It sufficiently answers also the argument of counsel that we did not prove at trial the execution of the mortgage given by R. E. Daggs to the bank on which the foreclosure suit against him was based. In his subsequent separate answer R. E. Daggs assumes his execution of the mortgage and makes no suggestion in denial thereof (Rec. 20).

VI.

The Water Stock.

While the appellants' argument on this head is in no sense pertinent here, we suggest in reply:

1. The appellants' separate answers concede that this water stock was pledged as collateral and additional security for the promissory notes given by appellant A. J. Daggs to the appellee bank. Until the debt is satisfied the bank properly retains a lien thereon and resulting custody of the stock. Clearly conversion cannot be predicated upon such conditions.

2. The matter is pleaded by way of *defense* and not as counter-claim, as imspection of the pleadings will show. (Rec. 21, par. III; Rec. 26, par. VII.)

3. Appellee's counsel admitted on the trial such collateral holding and offered to deposit the stock with the clerk of the Court for surrender on satisfaction of the

appellants' indebtedness to the bank through sale of the mortgaged realty (Rec. 57).

Manifestly the point is without merit.

VII.

Alteration in the mortgage is alleged. The contention is without merit; and the charge of fraud or design therein on part of appellee is both untrue and unsupported by any evidence.

Equally without merit is the assertion of misdescription in the mortgage given by appellant R. E. Daggs. Inspection of that mortgage (Rec. 3) discloses its full recital that the lands covered thereby all lie in Maricopa County, Arizona, and the further description by section, township, and range of each tract therein described renders its locus certain.

Foregoing slight digression from the reviewable record is justified solely by desire not to concede, by entire silence, the merit of appellants' argument. Their case is without merit, and were the record here in proper condition we could properly and completely answer all argument now advanced by appellants. Conscious that such further reply would subject us to just censure, we ask that silence shall not be taken as in any sense an admission of the correctness in fact or law of any part of appellants' assignment of errors or the brief submitted thereon. Upon the record as now open for review in this Court we submit all presumptions attend the correctness of the judgment below and that in every proper view it should be here affirmed.

Respectfully submitted.

ALDIS B. BROWNE,
ALEX. BRITTON,
Attorneys for Appellee.

DAGGS v. PHŒNIX NATIONAL BANK.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 138. Submitted January 30, 1900. — Decided April 30, 1900.

In the provision in Rev. Stat. § 5197 that when no rate of interest "is fixed by the laws of the State, or Territory, or District" in which a bank is situated it "may take, receive, reserve or charge a rate not exceeding seven per cent," the words "fixed by the laws" must be construed to mean "allowed by the laws."

THIS cause embraces three suits brought by the Phœnix National Bank against A. J. and R. E. Daggs, defendants in error. They were respectively numbered 2554, 2555 and 2556, and were consolidated by stipulations of the parties.

They were brought to recover on three promissory notes, aggregating the sum of $9741.73, signed by A. J. Daggs, one of the appellants. Each note was dated November 1, 1894, and payable on or before one year from date, with interest at the rate of ten per cent per annum. Also, to foreclose certain mortgages executed to secure the notes—one executed by R. E. Daggs on the 28th of November, 1894, on certain real estate in Maricopa County, Arizona, and on four water rights of the Consolidated Canal Company, represented by certificates; two executed by A. J. Daggs on same day, on certain other real estate situate in the same county.

The answers were substantially the same in all of the cases. They admitted the making of the notes and mortgages, but alleged that the interest charge was usurious, and in violation of sections 5197 and 5198 of the Revised Statutes of the United States.

As a counter-claim it was alleged that the plaintiff (appellee) was indebted to the defendant (appellant) upon a certain promissory note, executed by W. A. Daggs and P. P. Daggs, as copartners and as individuals, and delivered to Thomas Armstrong, Jr., and assigned by him to the plaintiff in blank, and by the latter, on the 28th of November, 1894, for a valuable

consideration, to the defendant, A. J. Daggs, at which time the makers were, and ever since have been, notoriously insolvent, all of which the plaintiff knew.

The note was as follows, marked "Exhibit A," and made part of the counter-claim:

"No. 1340. Due Sept. 1st.

"$5000.00. PHŒNIX, ARIZONA, *July 1st*, 1893.

"On the 1st day of September, 1893, without grace, we or either of us, for value received, promise to pay to Thos. Armstrong, Jr., at the Phœnix National Bank, at their office in Phœnix, Arizona, five thousand dollars ($5000) in United States gold coin, with interest at the rate of 1 and ¼ per cent per month, until paid. In case of legal proceedings hereon, we or either of us agree to pay 10 per cent of amount due hereon as attorney's fees.

"W. A. and P. P. DAGGS.

"Secured by chattel mortgage of even date herewith.

"W. A. DAGGS.

"P. P. DAGGS."

It was also alleged that no part of the note was paid, and that there was due thereon the sum of $7076.91. And judgment was prayed for the amount and interest.

For another defence, it was alleged that at the time of the execution of the three promissory notes sued on, the plaintiff (appellee) and the defendant, A. J. Daggs, entered into a contract in writing (a copy of which is attached to the answer, marked "Exhibit B") wherein the plaintiff as part of the consideration for the said three notes, sold and assigned and expressly stipulated that the three notes should be received in payment for all its rights, title and interest in and to that certain right in action, wherein Hugh McCrum was plaintiff and W. A. and P. A. Daggs were defendants, and plaintiff was intervenor, over that certain five thousand dollar note marked "Exhibit A" herein, and the mortgage securing the same.

That at said time the makers of said note were actually insolvent, which plaintiff knew, and it was agreed that plaintiff

should carry on the said litigation in its name until the cause of action should be determined and settled, and pay all costs accruing prior to November 1, 1894, and the defendant to pay those accruing thereafter. And it was alleged that the defendant paid out large sums of money in the prosecution of said suit, to wit, $45.65, as transcript fee from the court below, and $500 as costs, and expended work and labor of the reasonable value of $500, and has performed all the conditions of said contract, but that plaintiff (appellant) has failed to perform the conditions on its part to the damage of defendant in the sum $10,122.55.

For another defence, it was alleged that the defendant pledged certain water stock in the Tempe Irrigating Canal as security for said promissory notes, which was reasonably worth $4000, and that the plaintiff (appellee) has converted it to its own use, to defendant's damage in the sum of $4000, wherefore defendant prayed that he be relieved from the payment of interest on said notes, for his expenditures in said suit; the amount of said five thousand dollar note for four thousand dollars value of the water stock pledged, and for two thousand dollars damages.

In case No. 2555 the defendants filed a plea in abatement on account of the pendency of case No. 2554, and a like plea in case No. 2556. The pleas were overruled.

And in case No. 2555 A. J. Daggs moved for judgment upon his counter-claim on the ground that it was confessed, because no reply was made to it.

A similar motion was made in case No. 2556.

Testimony was taken and judgment was entered for the plaintiff, the Phœnix National Bank, against the defendant, A. J. Daggs, for the principal of the three notes and interest, and decreeing a foreclosure of the mortgages and the sale of the property mortgaged. A motion for a new trial was made and denied. On writ of error to the Supreme Court of the Territory the judgment was affirmed, (53 P. 201,) and an appeal was then taken to this court.

In passing on the case the Supreme Court of the Territory said:

"At the outset we are compelled to call attention to the

omission of counsel to comply with the statute and the rules of this court on the subject of assignments of error.

"These are imperative and must be observed. It is not our business to search the record if perchance we may find reversible error. It is our duty to examine into such alleged errors and only such as are distinctly pointed out in the record. The assignments made by plaintiffs in error in their brief are, for the most part, so general in character and so wanting in definiteness that they cannot be considered. Although defective as assignments, we have, by liberal construction, found that two of them present questions for our review.

"The first of these reads as follows:

"'The court erred in not giving judgment for plaintiffs in error on their pleas in bar of the recovery of any interest for the reason that the contract with the national bank for ten per cent interest is *ultra vires*.'

* * * * * * * *

"The second assignment of error made by plaintiffs in error, reads: 'The court erred in overruling the plaintiffs in error motion for judgment on the pleadings for the reason that there was no reply to plaintiffs in error verified counter-claim.'"

No statement of facts in the nature of a special verdict being certified with the record, the plaintiffs in error moved for and obtained from this court a certiorari to supply the defect, and in response thereto a statement of facts, which had been made by the Supreme Court of the Territory was certified to this court, in which was recited Act No. 71 of the Territory, regulating appeals and writs of error to the Supreme Court, the judgment of foreclosure and sale, the assignments of error of appellants, and concluded as follows:

"Under the assignments of error thus made and presented in the record this court could and did make no determination of the facts of the case, except such as appeared in the pleadings and judgment, for the reason that such of the assignments as were sufficient in form to raise any question presented none for our consideration which necessitated the further finding of facts in the case. We are unable to determine from the record presented in this court, in the absence of a bill of exceptions

and a statement of facts, what the facts were which were put in evidence on the trial in the court below, further than as they are shown by the transcript of the reporter's notes, and from such review of the record the judgment of the district court was affirmed as follows:

"'In the Supreme Court of the Territory of Arizona.

"'R. E. Daggs and A. J. Daggs, Plaintiffs in Error,
vs.
Phœnix National Bank, a Corporation, Defendants in Error.

"'This cause having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that the judgment of the district court herein be, and the same is hereby, affirmed.

"'It is further ordered and adjudged that the defendant in error herein do have and recover of and from the plaintiffs in error, R. E. Daggs and A. J. Daggs, as principals, and R. F. Doll, W. M. Billups, and the London Company, as sureties, on cost bond its costs in this court, taxed at forty-three and $\frac{10}{100}$ ($43.10) dollars.'

"By the court:

"Webster Street, *C. J.*
"Richard E. Sloan, *A. J.*
"Fletcher M. Doan, *C. J.*
"Geo. R. Davis, *A. J.*"

Asserting that the statement did not embody a finding of fact according to law, plaintiffs in error moved for a rule to show cause why a mandamus should not issue, commanding the Supreme Court of the Territory to make and certify a statement of the facts in the nature of a special verdict, and also the rulings of the district court on the admission and rejection of evidence excepted to.

Plaintiffs in error submitted with the motion a statement which they claimed the record justified.

The motion was denied January 29, 1900.

Mr. A. J. Daggs for appellants.

Mr. Aldis B. Browne and *Mr. Alexander Britton* for appellee.

MR. JUSTICE MCKENNA, after making the foregoing statement, delivered the opinion of the court.

We are confined by the record to the points passed on by the Supreme Court of the Territory, to wit, the defence of usury, and the motion for judgment on the counter-claim.

(1.) By section 5197 of the Revised Statutes of the United States a national bank may charge on any note interest at the rate allowed by the laws of the State or Territory where it is situated. It is further provided, however, that if no rate is fixed by such laws the bank may not charge a greater rate than 7 per cent, and if a greater rate be knowingly charged, the entire interest agreed to be paid shall be forfeited. (Sec. 5198.)

The laws of the Territory are as follows:

"2161. SEC. 1. When there is no express agreement fixing a different rate of interest, interest shall be allowed at the rate of seven per cent per annum on all moneys after they become due on any bond, bill, promissory note or other instrument in writing, or any judgment recovered in any court in this Territory, for money lent, for money due on any settlement of accounts from the day on which the balance is ascertained and for money received for the use of another."

"2162. SEC. 2. Parties may agree in writing for the payment of any rate of interest whatever on money due or to become due on any contract; any judgment rendered on such contract shall conform thereto, and shall bear the rate of interest agreed upon by the parties, and which shall be specified in the judgment."

The contention of appellant is that the rate of interest is not *fixed* by the laws of the Territory. It permits the parties to do so, but does not do so itself. In other words, it is urged that the rate is fixed by permission of the laws, and not by the laws, and upon this distinction a power which every person and every bank in the Territory has, it is contended, the national banks do not have.

We cannot accept this as a correct interpretation of either the spirit or the words of the national banking act. By that act, certainly no discrimination was intended against national banks, and that the interpretation contended for would seriously embarrass their business is manifest.

We said in *Tiffany* v. *National Bank of Missouri*, 18 Wall. 409, that national banks "were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the general government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with state banks."

The language of the Revised Statutes is that national banks "may take, receive, reserve and charge on any loan . . . upon any note . . . interest *allowed* by the laws of the State, Territory or district" where located, "and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under state laws, the rate so limited shall be *allowed* for associations organized or existing in any such State under this title." The italics are ours.

The meaning of these provisions is unmistakable. A national bank may charge interest at the rate *allowed* by the laws of the State or Territory where it is located; and equality is carefully secured with local banks.

The clear meaning and purpose of these provisions remove the ambiguity of those which follow, if there is any ambiguity. "Where no rate is *fixed* by the laws of the State or Territory or district, the bank may take, secure, reserve or charge a rate not exceeding seven per centum. . . ." "*Fixed by the laws*" must be construed to mean "*allowed by the laws*," not a rate expressed in the laws. In instances it might be that, but not necessarily. The intention of the national law is to adopt the state law, and permit to national banks what the state law allows to its citizens and to the banks organized by it. *Tiffany* v. *National Bank of Missouri*, *supra*.

It is urged, however that *National Bank* v. *Johnson*, 104 U. S. 271, is in conflict with these views.

In that case the defendant, a national bank doing business in

the State of New York, discounted for the plaintiff in the case, at the rate of twelve per cent per annum, commercial paper and promissory notes, amounting to $158,003. The interest which the bank knowingly charged amounted to $6564.88, an excess of $2735.36 beyond the rate allowed by the general laws of the State. Judgment was rendered for twice the amount of the interest, which was affirmed by this court upon the statute of the State, which established the rate of interest for the loan or forbearance of money at seven per cent.

Meeting the arguments of counsel upon a supposed difference between loans and discounts, and usurious and non-usurious contracts under the laws of the State in the transactions of natural persons, the learned justice, who delivered the opinion of the court, made some remarks which seemed to imply that a rate allowed by a state law was not a rate fixed by a state law. The remarks, however, were not necessary to the decision, and cannot be considered as expressing the judgment of the court.

(2.) The counter-claims of plaintiffs in error present these facts:

The making of the five thousand dollar note by W. A. and P. P. Daggs, and its delivery to Thomas Armstrong, Jr.; its assignment by the latter to the Phœnix National Bank, (appellee,) and by the bank, in writing, for a valuable consideration to the defendant, A. J. Daggs (one of the appellants); the insolvency of the makers, W. A. and P. P. Daggs, and the non-payment of the note or any part of it.

To the counter-claim there was a demurrer for insufficiency, and a denial of each and every one of its allegations. The denial was not verified. The Supreme Court of the Territory, considering an error assigned on the overruling of appellants' motion for judgment on the counter-claim, held it insufficient because it did not allege that due diligence to collect the note had been exercised, as required by the statute of the Territory, or that any effort had been made to collect the same.

By this ruling it is urged that the court assumed that the counter-claim was based on the rights of a surety instead of upon the direct obligation of the Phœnix Bank, as assignor of the Armstrong note on account of Armstrong's insolvency. Articles 122, 1226 and 788 of the Arizona Statutes.

Assuming without deciding that appellants are correct in their construction of the Arizona statutes, and assuming that the answer to the counter-claim did not put in issue the making of the Armstrong note, and its assignment to plaintiff in error, nevertheless the answer to the counter-claim did put in issue the other facts alleged, to wit, the insolvency of the makers of the note and its non-payment.

But it is said that the contract marked "Exhibit B" shows the insolvency. It certainly does not. It recites the transfer of the Armstrong note to A. J. Daggs, and that it is secured by a mortgage on 3500 sheep; that the note is in litigation between the Phœnix Bank and Hugh McCrum of San Francisco as assignee of D. A. Abrams as assignee of the Bank of Tempe, "to establish and determine the priorities of rights under mortgages between said litigants hereinbefore mentioned, which said cause of action and rights of the Phœnix National Bank, under its first mortgage in said litigation described, is also hereby sold, assigned, transferred and set over unto A. J. Daggs for the above nine thousand seven hundred and forty-one and $\frac{73}{100}$ dollars ($9741.73). It is further agreed that the aforesaid cause of action described shall be continued in the name of the Phœnix National Bank until the said case is determined and settled; but it is further agreed that from this date, November 1, 1894, A. J. Daggs shall pay the costs that shall hereafter accrue in the said case."

This contract standing alone establishes nothing definite, and appreciating this the appellants attempt to explain it by a resort to what they allege to be the testimony in the case. It is said that "they (W. A. and P. P. Daggs) could not pay their notes, three suits in court foreclosing three mortgages, each seeking priority, hanging to them like mill stones, grinding them to dust. Appellee had lost its reputed first mortgage in the district court and appealed. It then sold this note and litigation; the contract shows, and agreed to stand up and carry the suit on in its name. The case was tried in the Supreme Court of Arizona, and held adversely to the appellee in appellants' suit against the makers of the five thousand dollar note. The appellee then fell down and refused to let its name be used any farther to carry on

the suit, refused to sign the bond, and would have nothing more to do with the suit. . . . Appellant then demanded payment of the five thousand dollar note, and was refused. Appellant spent over $500 in money and $500 in services prosecuting the makers of the $5000 note; followed it to the Supreme Court of Arizona, and would have gone further, but appellee refused to let its name be used and he was compelled to stop. Appellant then demanded credit for the $5000 note."

Those facts, however, are not a part of the counter-claim and it is hardly necessary to say cannot be considered in passing on a motion for judgment based on a confession of the allegations of the counter-claim.

Nor can it be said that such facts should have been found by the lower court, because, as we have seen, under the statement of the case as considered by that court, the questions for decision was the sufficiency of the averments of the counter-claim as a defence.

We repeat, therefore, that we are confined to the propositions we have stated above and discussed, and as there was no prejudicial error in the ruling of the Supreme Court of the Territory on them, its judgment is

Affirmed.